CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 SEPTEMBER 6, 1995 NO. 36

This issue contains:
U.S. Customs Service
T.D. 95–66
General Notices
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Slip Op. 95–146 Through 95–149

AVAILABILITY OF BOUND VOLUMES
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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the Customs Bulletin are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 95–66)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved March 22, 1995 to April 28, 1995, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: August 17, 1995.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Abbott Laboratories
Articles: Zileuton
Merchandise: 1-Benzo(B)thien-2-YL-ethanone; hydroxylamine, aqueous; potassium cyanate; borane pyridine
Factories: North Chicago & Abbott Park, IL
Proposal signed: September 21, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Chicago, April 17, 1995

(B) Company: Albemarle Corp. (successor to Ethyl Corporation's T.D. 90–38–G under 19 U.S.C. 1313(s))
Articles: Tetrabromobisphenol-A
Merchandise: Bisphenol-A
Factory: Magnolia, AR
Proposal signed: June 24, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Houston, April 3, 1995

(C) Company: Albemarle Corp. (successor to Ethyl Corporation's T.D. 80–122–K under 19 U.S.C. 1313(s))
Articles: 2-methyl-6-ethyl aniline (MEA)
Merchandise: Ortho toluidine
Factory: Pasadena, TX
Proposal signed: July 25, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Houston, April 18, 1995

(D) Company: Albemarle Corp. (successor to Ethyl Corporation's T.D. 90–91–I under 19 U.S.C. 1313(s))
Articles: Decabromodiphenyl oxide; octabromodiphenyl oxide
Merchandise: Diphenyl oxide
Factory: Magnolia, AR
Proposal signed: June 24, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Houston, April 26, 1995

(E) Company: Albemarle Corp. (successor to Ethyl Corporation's T.D. 93–42–I under 19 U.S.C. 1313(s))
Articles: Butenes; mid-olefins; heavy olefins; light alcohols; mid-alcohols; heavy alcohols
Merchandise: Ethylene
Factories: Magnolia, AR; Pasadena, TX
Proposal signed: June 24, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, April 26, 1995

(F) Company: BASF Corp.
Articles: Storm herbicide; Galaxy herbicide
Merchandise: Basagran manufacturer's concentrate a/k/a bentazone
Factories: At its agents operating under T.D. 55027(2) and T.D. 55207(1)
Proposal signed: September 26, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, April 17, 1995

(G) Company: BASF Corp.
Articles: Formulated basagran
Merchandise: Basaran manufacturer's concentrate
Factories: La Porte & Highlands, TX; Webster City, IA (agents operating under T.D. 81–181)
Proposal signed: October 26, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, April 21, 1995

(H) Company: Cyro Industries (Partnership)
Articles: Methyl methacrylate monomer (MMA)
Merchandise: Acetone (dimethylketone; 2-propanone)
Factory: Avondale, LA
Proposal signed: September 8, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, April 28, 1995

(I) Company: The Dow Chemical Co.
Articles: Ethylene dichloride; vinyl chloride monomer
Merchandise: Ethylene; ethylene dichloride
Factories: Freeport, TX; Plaquemine, LA
Proposal signed: June 20, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Houston, March 30, 1995

(J) Company: Elan Inc.
Articles: Para ethoxy ethyl benzoate (PEEB)
Merchandise: Para-hydroxy benzoic acid (POB)
Factory: Newark, NJ
Proposal signed: September 9, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, March 31, 1995

(K) Company: Golden Gem Growers, Inc.
Articles: Orange juice from concentrate (reconstituted juice); frozen concentrated orange juice; bulk frozen concentrated orange juice
Merchandise: Concentrated orange juice for manufacturing
Factory: Umatilla, FL
Proposal signed: July 22, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Miami, April 26, 1995
Revokes: T.D. 79–259–C

(L) Company: The Goodyear Tire & Rubber Co.
Articles: Tires
Merchandise: Polyester cord fabric
Factories: Akron, OH; Cartersville & Calhoun, GA; Danville, VA; Gadsden & Decatur, AL; Lawton, OK; Topeka, KS; Union City, TN; Houston, Beaumont & Bayport, TX; Niagara Falls, NY; Pt. Pleasant, WV
Proposal signed: October 14, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, March 22, 1995

(M) Company: The Goodyear Tire & Rubber Co.
Articles: Tires
Merchandise: Rayon olbo fabric
Factory: Union City, TN
Proposal signed: October 17, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, March 22, 1995

(N) Company: The Goodyear Tire & Rubber Co.
Articles: Tires; hose; V-belts; tank treads; air springs
Merchandise: N-Cyclohexylthiophthalimide (LIEBAX); N,N′-Diisopropyl-benzothiazole-2-sulfenamide (DIBSAX)
Factories: Akron, Greensburg, Jackson, St. Marys, OH; Danville, VA; Gadsen, AL; Lawton, OK; Topeka, KS; Union City, TN; Lincoln, Norfolk, NE; Hannibal, MD; Mt. Pleasant, IA; Sun Prairie, WI; Atlanta, GA; Kingsman, AZ
Proposal signed: March 21, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, March 30, 1995

(O) Company: Hercules, Inc.
Articles: Various synthetic resins
Merchandise: Diethylenetriamine
Factory: Savannah, GA
Proposal signed: October 26, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: Boston, April 21, 1995
Revokes: T.D. 75–233–V and T.D. 76–282–F

(P) Company: ISK Biosciences Corp.
Articles: Daconil 2787 (a/k/a technical tetrachloroisophthalonitrile); Ground Daconil 2787; Bravo 500 (a/k/a Daconil flowable, Tuffcide 404, Nopcocide N40D or Chlorothalonil 500); Bravo 720
Merchandise: Activated carbon; isophthalonitrile
Factory: Houston, TX
Proposal signed: February 9, 1995
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, April 18, 1995

(Q) Company: Jefferson Mills, Inc.
Articles: Texturized nylon yarn
Merchandise: Nylon yarn, type 6/6, undyed
Factory: Pulaski, VA
Proposal signed: March 15, 1995
Basis of claim: Used in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, April 5, 1995
Revokes: T.D. 82–39–K to cover the merger of Kahn & Feldman, Inc. into and reincorporation as Jefferson Mills, Inc.

(R) Company: Magma Copper Co.
Articles: Copper cathodes; coper rod coils
Merchandise: Blister copper; copper anodes
Factories: San Manuel, Superior & Miami, AZ
Proposal signed: June 10, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), April 11, 1995

(S) Company: Osram Sylvania Inc.
Articles: Molybdenum products
Merchandise: Molybdenum oxide
Factories: Towanda, PA; Madisonville, KY; Ipswich, MA; Luquillo, PR; Exeter, NH; Waldoboro, ME
Proposal signed: November 22, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, April 17, 1995

(T) Company: Pearl River Polymers, Inc.
Articles: Water soluable polymers
Merchandise: Epichlorohydrin; dimethylamine; allyl chloride
Factory: Pearl River, LA
Proposal signed: September 27, 1994
Basis of claim: Used in
Contract forwarded to RC of Custom: New York, April 18, 1995

(U) Company: Pfizer Pharmaceuticals, Inc.
Articles: Sertraline HCl
Merchandise: D-(-) mandolic acid; 4-(3,4) dichlorophenyl (tetralone)
Factory: Barceloneta, PR
Proposal signed: August 23, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, April 18, 1995

(V) Company: Rea Magnet Wire Co., Inc.
Articles: Copper wire
Merchandise: Copper rod
Factories: Fort Wayne & Lafayette, IN; Laurinburg, NC
Proposal signed: December 14, 1994
Basis of claim: Appearing in
Contract forwaded to RC of Customs: Chicago, April 17, 1995

(W) Company: Sartomer Co., Inc.
Articles: Mono & multifunctional acrylates; methacrylate monomers
Merchandise: 1,6 hexanediol; 5 mole ethoxylated pentaerythritol; glacial acrylic acid; di-pentaerythritol (Di-PE); hydroquinone; hypophosphorous acid; tris (2-hydroxyethyl) isocyanurate; di-trimethylolpropane (Di-TMP); N-nitroso diphenylamine
Factory: West Chester, PA
Proposal signed: June 9, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, April 21, 1995

(X) Company; UOP (Partnership)
Articles: Gasoline antioxidant; rubber antiozonants
Merchandise: Paranitroaniline
Factory: McCook, IL
Proposal signed: April 21, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs; Chicago, March 31, 1995

(Y) Company: West Wood Products, Inc.
Articles: Lauan plywood doorskins
Merchandise: Lauan plywood sheets
Factories: at its agents operating under T.D. 55027(2) and/or T.D. 55207(1)
Proposal signed: June 5, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, April 18, 1995

(Z) Company: Zeneca Inc.
Articles: Ro-Neet 7-2E and Ro-Neet 6E (thiocarbamate herbicides)
Merchandise: Roneet technical (a/k/a carbamothioic acid and 2-ethyl-cyclohexylethylthiocarbamate)
Factories: St. Gabriel, LA; Omaha, NE
Proposal signed: August 22, 1994
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, April 18, 1995

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 8–1995)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of July 1995 follow. The last notice was published in the CUSTOMS BULLETIN on August 2 1995.

Corrections or information to update files may be sent to:

U.S. Customs Service
IPR Branch
1301 Constitution Avenue NW (Franklin Court)
Washington, DC 20229

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: August 22, 1995.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

08/17/95
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U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN JULY 1995

PAGE 1
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9500135	19950712	20150712	CHRISTMAS SILHOUETTES ORNAMENTAL SERIES COLLECTION	MARKEE PRODUCTS CORP.	N
COP9500136	19950712	20150712	HALLOWEEN SILHOUETTES ORNAMENTAL WINDOW SERIES	MARKEE PRODUCTS CORP.	N
COP9500137	19950712	20150712	CHRISTMAS SILHOUETTES ORNAMENTAL SERIES COLLECTION 1993	MARKEE PRODUCTS CORP.	N
COP9500138	19950718	20150718	SHAKING MONKEY IN A CAGE	TRENDMASTERS, INC.	N
COP9500139	19950718	20150718	UNDER FIRE	TAITO CORPORATION	N
COP9500140	19950718	20150718	REVISED ATLANTA 1996 MASCOT DESIGN	ATLANTA COMMITTEE FOR THE OLYMPI	N
COP9500141	19950720	20150720	TOP SPEED	MATTEL, INC.	N
COP9500142	19950720	20150720	LUBRIDERM LOOFA BAR	WARNER-LAMBERT COMPANY	N
COP9500143	19950720	20150720	LUBRIDERM ONE STEP BROCHURE	WARNER-LAMBERT COMPANY	N
COP9500144	19950720	20150720	LUBRIDERM DRY SKIN LOTION	WARNER-LAMBERT COMPANY	N
COP9500145	19950721	20150721	MAGIC THE GATHERING	WIZARDS OF THE COAST INC.	N
SUBTOTAL RECORDATION TYPE			11		
TMK9500347	19950711	20030309	CHING KEE, (CHINESE CHARACTERS	CHING KEE FOOD PRODUCTS CO.	N
TMK9500348	19950711	20050418	CHING KEE	CHING KEE FOOD PRODUCTS CO.	N
TMK9500349	19950711	20090516	LUIGI VITELLI	VITELLI-ELVEA COMPANY, INC.	Y
TMK9500350	19950711	20030126	MARBLE COMPOSITION	AMERICAN SCHOLAR INC.	N
TMK9500351	19950727	20050418	ROSE DESIGN	WHITE ROSE NURSERIES LIMITED	N
TMK9500352	19950727	20090808	CH	CAROLINA HERRERA LTD.	Y
TMK9500353	19950711	20021103	BY PALOMA PICASSO (AND DESIGN)	ANNE PALOMA AND LOPEZ CAMBIL	N
TMK9500354	19950711	20030803	LETTER X IN A STYLIZED DESIGN	ANNE PALOMA AND LOPEZ CAMBIL	N
TMK9500355	19950711	20030517	UNIVERSITY OF NOTRE DAME SEAL	UNIVERSITY OF NOTRE DAME DU LAC	Y
TMK9500356	19950712	20060927	CO-RAY-VAC (GAS FIRED INFRA-RED HEATING APPARAUTUS)	ROBERTS-GORDON, INC.	N
TMK9500357	19950712	20050502	PARALYMPIC	OLYMPIC COMMITTEE	Y
TMK9500358	19950713	20000220	PRINCETON GRAPHIC SYSTEMS	MAG INNOVISION, INC,	Y
TMK9500359	19950713	20010425	INTERLOCKING ND, STYLIZED LETTERING	UNIVERSITY OF NOTRE DAME DU LAC	Y
TMK9500360	19950714	20031208	DOME LOGO (CLOTHING)	UNIVERSITY OF NOTRE DAME DU LAC	Y
TMK9500361	19950714	20040124	FIGHTIN' IRISH	UNIVERSITY OF NOTRE DAME DU LAC	Y
TMK9500362	19950714	20030308	DESIGN OF A FIGHTING LEPRECHAUN	UNIVERSITY OF NOTRE DAME DU LAC	Y
TMK9500363	19950717	20031012	BIG DOG SPORTSWEAR	FORTUNE DOGS INC.	Y
TMK9500364	19950717	20040201	MISCELLANEOUS DESIGN MARK	FORTUNE DOGS INC.	Y
TMK9500365	19950717	20090531	MISCELLANEOUS DESIGN MARK	FORTUNE DOGS INC.	Y
TMK9500366	19950717	20040705	BIG DOGS	FORTUNE DOGS INC.	Y
TMK9500367	19950717	20070929	BIG DOGS	FORTUNE DOGS INC.	Y
TMK9500368	19950719	20081025	ALBERTUS	MONOTYPE CORPORATION	Y
TMK9500369	19950719	20010914	DUNHILL & DESIGN	DUNHILL TOBACCO OF LONDON LTD.	N
TMK9500370	19950719	20041120	CIGARETTE BOX DESIGN	DUNHILL TOBACCO OF LONDON LTD.	N
TMK9500371	19950719	20020622	DUNHILL & DESIGN	DUNHILL TOBACCO OF LONDON LTD.	N
TMK9500372	19950720	20050314	MULTIPULSE	TALLEY GROUP LTD.,	N
TMK9500373	19950720	20050404	MULTICOM	TALLEY GROUP LTD.,	N
TMK9500374	19950720	19960714	LORENZANA	LORENZANA INDUSTRIES, INC.	N
TMK9500375	19950720	20050806	LORENZANA AND DESIGN	LORENZANA INDUSTRIES, INC.	N
TMK9500376	19950720	20060826	REVO	REVO, INC.	N
TMK9500377	19950720	19990110	ZANELLA	ZANELLA S.P.A.	N
TMK9500378	19950720	19990228	ZANELLA AND DESIGN	ZANELLA S.P.A.	N
TMK9500379	19950720	20030720	DAKOTA SMITH AND DESIGN	CALIFORNIA DESIGN STUDIO, INC.	Y
TMK9500380	19950720	20020630	DAKOTA A NEW FRONTIER - A NEW EXCITEMENT AND DESIGN	CALIFORNIA DESIGN STUDIO, INC.	Y
TMK9500381	19950720	20030810	TONES	SUPREME INTERNATIONAL CORP.	Y

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IPR RECORDATIONS ADDED IN JULY 1995

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DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9500382	19950720	20021201	CHINESE CHARACTERS	SO'S U.S.A., CO., INC.	Y
TMK9500383	19950720	20010319	SUPREME	SUPREME INTERNATIONAL CORP.	Y
TMK9500384	19950720	20011013	FELDINI	SUPREME INTERNATIONAL CORP.	Y
TMK9500385	19950720	19980124	DILANTIN	WARNER-LAMBERT CO.E DAME DU LAC	N
TMK9500386	19950720	19990613	COGNEX	WARNER-LAMBERT CO.E DAME DU LAC	N
TMK9500387	19950720	20060218	NEURONTIN	WARNER-LAMBERT CO.E DAME DU LAC	N
TMK9500388	19950720	20021201	ACCUPRIL LOGO	WARNER-LAMBERT CO.E DAME DU LAC	N
TMK9500389	19950720	19990124	ACCUPRIL	WARNER-LAMBERT CO.E DAME DU LAC	N
TMK9500390	19950720	20011229	LOPID	WARNER-LAMBERT CO.E DAME DU LAC	N
TMK9500391	19950720	19990725	PELONIS SAFE-T-FURNACE	PELKO ELECTRIC, INC.	N
TMK9500392	19950720	20041025	DURACLEAN	WILSHIRE TECHNOLOGIES, INC.	N
TMK9500393	19950720	20030118	NOTRE DAME	UNIVERSITY OF NOTRE DAME DU LAC	Y
TMK9500394	19950720	20040503	NBA	NBA PROPERTIES, INC.	N
TMK9500395	19950720	20040426	NBA	NBA PROPERTIES, INC.	N
TMK9500396	19950720	20080927	NBA	NBA PROPERTIES, INC.	N
TMK9500397	19950720	20040510	NBA	NBA PROPERTIES, INC.	N
TMK9500398	19950720	20071117	CONFIGURATION OF A TAG	MAGRI HOLLAND, B.V.	N
TMK9500399	19950720	20090215	LUBRIDERM	WARNER-LAMBERT COMPANY	N
TMK9500400	19950720	20021022	LISTERINE FACETED BOTTLE	WARNER-LAMBERT COMPANY	N
TMK9500401	19950720	20080302	LISTERINE	WARNER-LAMBERT COMPANY	N
TMK9500402	19950720	20050829	LISTERINE	WARNER-LAMBERT COMPANY	N
TMK9500403	19950720	20021027	COOL MINT LISTERINE	WARNER-LAMBERT COMPANY	N
TMK9500404	19950721	20050103	CHIEF	C.B.P. LIMITED	N
TMK9500405	19950721	20090606	CHIEF DESIGN	C.B.P. LIMITED	N
TMK9500406	19950721	19970423	UGLI FRUIT AND DESIGN	CABEL HALL CITRUS LIMITED	N
TMK9500407	19950721	20040222	HEF-T 100	TEE JAYS MFG., CO., INC.	N
TMK9500408	19950721	20030209	TEE JAYS	TEE JAYS MFG., CO., INC.	N
TMK9500409	19950721	20000220	T.J.	TEE JAYS MFG., CO., INC.	N
TMK9500410	19950721	20050409	SELEC-T	TEE JAYS MFG., CO., INC.	N
TMK9500411	19950721	20040510	HEFTYS	TEE JAYS MFG., CO., INC.	N
TMK9500412	19950721	20021229	SOF TEE AND DESIGN	TEE JAYS MFG., CO., INC.	N
TMK9500413	19950721	20000703	T.J.'S	TEE JAYS MFG., CO., INC.	N
TMK9500414	19950724	20080301	ALLFLEX AND DESIGN	MAGRI HOLLAND, B.V.	N
TMK9500415	19950727	19990206	RIDDELL	RIDMARK CORPORATION	N
TMK9500416	19950727	20050627	WEIGHPACK	WEIGHPACK INTERNATIONAL B.V.	N
TMK9500417	19950727	20031207	OPTIMA	CONDOR FARMS, INC.	N

SUBTOTAL RECORDATION TYPE 71

TOTAL RECORDATIONS ADDED THIS MONTH 82

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 22, 1995.

The following document of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Harvey B. Fox, Director,
Office of Regulations and Rulings.)

NOTICE TO REQUIRE SUBMISSION OF ROYALTY AND PURCHASE/SUPPLY AGREEMENTS IN RULING REQUESTS REGARDING DUTIABILITY OF ROYALTY OR LICENSE FEES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces that in order to obtain a ruling regarding the dutiability of royalty or license fees, any royalty agreement[s] relating to the payment of the royalty or license fees in question and any purchase/supply agreement[s] relating to the sale of the imported merchandise must be furnished. If there are no written agreements, the ruling request should so indicate.

DATES: All future ruling requests regarding the dutiability of royalty or license fees, must contain the above agreements.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart (202) 482–7010.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The primary method of appraising imported merchandise is transaction value. Section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. § 1401a), provides that the transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus certain specified additions, including any royalty or license fee related to the imported merchandise that the buyer is required to pay as a condition of the sale for export to the U.S. (Section 402(b)(1)(D)).

With regard to royalties, the Statement of Administrative Action (SAA), adopted by Congress with the passage of the TAA, explains that:

> [a]dditions for royalties and license fees will be limited to those that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States. [R]oyalties and license fees for patents covering processes to manufacture the imported merchandise will generally be dutiable, whereas royalties and license fees paid to third parties for use in the United States, of copyrights and trademarks related to the imported merchandise, will generally be considered as selling expenses of the buyer and therefore will not be dutiable. However, the dutiable status of royalties and license fees paid by the buyer must be determined on case-by-case basis and will ultimately depend on: (i) whether the buyer was required to pay them as a condition of sale of the imported merchandise for exportation to the United States; and (ii) to whom and under what circumstances they were paid. For example, if the buyer pays a third party for the right to use, in the United States, a trademark or copyright relating to the imported merchandise, and such payment was not a condition of the sale of the merchandise for exportation to the United States, such payment will not be added to the price actually paid or payable. However, if such payment was made by the buyer as a condition of the sale of the merchandise for exportation to the United States, an addition will be made. As a further example, an addition will be made for any royalty or license fee paid by the buyer to the seller, unless the buyer can establish that such payment is distinct from the price actually paid or payable for the imported merchandise, and was not a condition of the sale of the imported merchandise for exportation to the United States, SAA, H.R. Doc. No. 153, Pt. II, 96th Cong., 1st Sess. (1979), reprinted in *Department of the Treasury, Customs Valuation under the Trade Agreements Act of 1979* at 48–49 (1981).

In the General Notice, Dutiability of Royalty Payments, Vol. 27, No. 6 Cust. B. & Dec. at 1 (February 10, 1993), Customs articulated three factors that assist in determining whether the payments in question are related to the imported merchandise and are a condition of sale. These factors are whether 1) the imported merchandise was manufactured under patent; 2) the royalty was involved in the production or sale of the imported merchandise and; 3) the importer could buy the product without paying the fee. Negative responses to factors one and two and an affirmative response to factor three point towards non-dutiability.

Section 177.2(b), Customs Regulations (19 C.F.R. § 177.2(b)) provides that a request for a ruling must contain a complete statement of all relevant facts relating to the transaction, including a description of the transaction itself, appropriate in detail to the type of ruling requested. That section further provides that with respect to a request for a valuation ruling, the ruling request must contain any information relevant to a determination under the TAA. In order for Customs to better address the underlying issues relating to the dutiability of royalty or

license fees, especially whether the buyer is required to pay the royalty or license fees as a condition of sale of the imported merchandise for exportation to the United States, and where the royalty is paid to the seller, whether it is distinct from the price actually paid or payable, a review of the royalty agreement[s] relating to the payment of the royalty or license fees in question and any purchase/supply agreement[s] pertaining to the sale of the imported merchandise for exportation to the United States is necessary. Therefore, in all future ruling requests regarding the dutiability of royalty or license fees, these documents must be submitted. If there are no such written agreements, the request should so indicate.

Dated: August 8, 1995.

HARVEY B. FOX,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 22, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Harvey B. Fox, Director,
Office of Regulations and Rulings.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WOMEN'S WOVEN COTTON FLANNEL BOXER SHORTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying, in part, a ruling pertaining to the tariff classification of certain women's woven cotton flannel boxer shorts. Notice of the proposed modification was published July 12, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after November 6, 1995.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 12, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 28, proposing to modify Headquarter Ruling Letter (HQ) 951754, dated June 25, 1992. That ruling classified certain women's woven cotton flannel boxer shorts as women's shorts in subheading 6204.62.4055, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), based in part on objective criteria used as an aid in determining whether men's boxer style garments were non-

underwear garments. Since the issuance of HQ 951754, this office has addressed the classification of these types of garments on numerous occasions and it it our opinion that the analysis in HQ 951754 is in error. The guidelines which were used as part of the analysis to determine whether the women's boxer shorts should be classified as sleepwear or shorts were created for **men's** boxer style garments; they were not drafted with women's garment's in mind. Their use in the analysis portion of HQ 951754 was in error.

No comments were received in response to our notice of intent to modify HQ 951754.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying, in part, HQ 951754, to reflect the proper analysis of the merchandise at issue. HQ 957133 modifying HQ 951754 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 14, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 14, 1995.

CLA-2 R:C:T 957133 jb
Category: Classification
Tariff No. 6204.62.4055

STEPHEN M. ZELMAN, ESQ.
845 Third Avenue, 17th Floor
New York, NY 10022

Re: Modification of HQ 951754; incorrect use of criteria used in determining whether women's shorts are a non-underwear garment; criteria are for men's boxer style garments only; for women's shorts, heading 6204, HTSUSA, is an *eo nomine* provision with no limiting language regarding use.

DEAR MR. ZELMAN:

On June 25, 1992, this office issued to you, on behalf of your client, Craftex Creations, Inc., HQ 951754, regarding the classification of certain women's woven cotton flannel boxer shorts. We have had occasion to review that ruling and have determined that it is in error, in part, as regards to the analysis. The outcome (for quota and visa purposes) remains unchanged.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–82, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of HQ 951754 was published July 12, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 28.

Facts:

The merchandise in question, style number 12061D, is a pair of women's boxer-style shorts constructed from woven 100 percent cotton flannel yarn-dyed plaid fabric. The pull-on shorts feature a fully elasticized waist with a turned waistband, fly front opening secured by a single visible button, single center back seam and hemmed mid-thigh length legs. In the analysis, HQ 951754 referred to HQ 087940, dated September 16, 1991, which stated seven characteristics as a guideline to determine whether or not a men's boxer-style garment can be considered underwear.

Issue:

Whether the use of the guidelines set out in HQ 087940 was proper when discussing a women's boxer-style garment?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification will be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, taken in order.

HQ 951754 referred to HQ 087940, wherein Customs dealt with the tariff classification of a pair of boxer shorts claimed to be men's underwear. That ruling listed seven features considered indicative of non-underwear garments. Though HQ 087940 created objective criteria to be used as an aid in determining if certain boxer style garments were non-underwear garments, the criteria were created for **men's boxer style garments,** they were not drafted with women's garments in mind. This is further evidenced form the statement in the ruling that "boxer shorts are not worn by women in underwear * * *." This belief has been restated by Customs in several rulings. See HQ 087922, dated October 2, 1991; HQ 087942, dated October 2, 1991; and, NYRL 894070, dated February 18, 1994.

Thus, the use of the criteria set out in HQ 087940 in analyzing the classification of a woman's pair of boxer shorts in HQ 951754 was in error and should be disregarded. However, additional factors such as marketing and advertising, as well as the garment itself, were utilized in reaching the classification decision in HQ 951754. Those portions of the analysis remain unchanged. By this modification Customs would add the following to the analysis:

Heading 6204, HTSUSA, provides for, among other thing, women's shorts. Shorts in heading 6204, HTSUSA, is an *eo nomine* provision with no limiting language regarding use. Thus, women's shorts in this heading includes all forms of women's shorts for all uses unless the garment is more specifically provided for elsewhere in the tariff. It is a basic tenet of tariff classification that "an *eo nomine* statutory designation of an article, without limitations or a shown contrary legislative intent, judicial decision, or administrative practice to the contrary, and without proof of commercial designation, will include all forms of said article." *Nootka Packing Co. et. al. v. United States,* 22 CCPA 464, 470, T.D. 47464 (1935).

This office acknowledges the fact that current fashion trends have dictated that it is fashionable for women to wear boxer shorts as outerwear shorts on the streets. This use is also well recognized in the trade. A review of articles on boxer shorts and their use by women supports the position taken by Customs that women in the United States wear boxer shorts principally as outerwear shorts. In 1988 an article in the *New York Times,* Section B, p. 6, dated July 12, 1988, titled "Boxer Shorts Meet the Sun", stated: "Boxer shorts- also having a big revival with men- have found new popularity as street wear for women." In yet another article, the *New York Times,* Section 1, Part 2, p. 34, dated January 28, 1990, reported on the underwear designer Nicholas Graham, under the headline "Style Makers; Nicholas Graham: Underwear Designer". The writer commented that sales of boxer shorts to women as outerwear accounted for 50 percent of the sales by Mr. Graham's company.

As regards the subject garment, the type of fabric and the design and construction of the garment make it likely that women will wear this garment as outerwear shorts. In addition, and as has been explicitly discussed, there is insufficient proof submitted by you, in

the way of marketing and advertising to refute the presumption that the garment is an outerwear garment.

Accordingly, based on the arguments put forth above, the garment is classified as women's shorts in heading 6204, HTSUSA.

Holding:

The women's boxer-style shorts, referenced Style number 12061D, are classified in subheading 6204.62.4055, HTSUSA, which provides for, *inter alia,* women's shorts. There is no change for quota and visa purposes.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SALVAGED PIECES OF NEW CLOTH

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain salvaged pieces of new cloth used for wiping, cleaning and dusting. Notice of the proposed modification was published July 19, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 29.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 6, 1995.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 19, 1995, Customs published in the CUSTOMS BULLETIN, Volume 29, Number 29, proposing to modify District Decision (DD) 806654, dated March 9, 1995, concerning the tariff classification of certain salvaged pieces of new cloth.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation

Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 806654 to reflect proper classification of the salvaged pieces of new cloth in subheading 6002.92.9000, HTSUSA. HQ 957750 modifying DD 806654 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: August 22, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Washington, DC, August 22, 1995.
CLA-2 R:C:T 957750 jb
Category: Classification
Tariff No. 6002.92.9000

ZIA RASHID
AINY INC.
201 Locustwood Blvd.
Elmont, NY, 11003

Re: Modification of DD 806654, jersey knit fabric of weft knit; heading 6002, HTSUSA.

DEAR MR. RASHID:

On March 9, 1995, Customs issued to you District ruling (DD) 806654 regarding the classification of certain salvaged pieces of cloth used for wiping, cleaning and wiping. After careful review of that ruling, we have determined that it is partly in error. A sample was submitted to this office for examination.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 806654 was published July 19, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 29.

Facts:

The merchandise at issue consists of salvaged pieces of cotton knit fabric which has been downgraded and rejected by the knitting mill. The cloth will be imported from Pakistan and used for wiping, cleaning and dusting. They are composed of jersey knit fabric and are of a variety of sizes. The imports will be white fabric only and will consist of rectangular "fiats" ranging in size from approximately 16 inches by 18 inches to 30 inches by 30 inches. The "tubular" pieces are 56 inches by 17 inches (or 28 inches by 17 inches if measured in a flattened condition). The merchandise is approximately square cut, i.e., the sides are generally straight, not jagged or notched. The items are not worn, soiled or torn, nor are considered small clippings such as dressmaker's or tailor's.

In DD 806654, the cloth pieces were classified in subheading 6002.42.0000, HTSUSA, which provides for other knit or crocheted fabrics: other fabrics, warp knit: of cotton. It has been brought to our attention that though the merchandise is correctly classified as jersey knit fabrics, in heading 6002, HTSUSA, they are of weft knit construction and not warp construction.

Issue:

What is the correct classification of the merchandise at issue?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is in accordance with the General Rules of Interpretation (GRI). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, in the order of appearance.

Heading 6310, HTSUSA, provides for, among other things, used or new rags. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 6310, HTSUSA, state:

> (1) Rags of textile fabrics (including knitted or crocheted fabrics, felt or nonwovens). Rags may consist of articles of furnishing or clothing or of other old textile articles so worn out, soiled or torn as to be beyond cleaning or repair, or of small new cuttings (e.g., dressmakers' or tailors' snippings).
>
> * * * * * * *
>
> To fall in the heading, these products **must** be worn, dirty or torn, or in small pieces. They are generally fit only for the recovery (e.g., by pulling) of the fibres (which are usually re-spun), for the manufacture of paper or plastics, for the manufacture of polishing materials (e.g., polishing wheels), or for use as industrial wipers (e.g., machine wipers).

The subject merchandise does not meet the criteria outlined in the EN to heading 6310, HTSUSA, for classification as "used or new rags". The merchandise at issue is too large and lacks mutilation. Additionally, the merchandise is neither worn out, soiled or torn. Though the merchandise was correctly described as jersey knit fabric, it was incorrectly classified as warp knit. Assuming that the circular knit fabric is not made wholly of cotton yarns exceeding 100mm per single yarn, it should have been classified in subheading 6002.92.9000, HTSUSA.

Holding:

The subject merchandise is correctly classified in subheading 6002.92.9000, HTSUSA, which provides for other knitted or crocheted fabrics: other: of cotton: other. The applicable rate of duty is 13.6 percent *ad valorem* and the quota category is 222.

DD 806654 of March 9, 1995, is modified to reflect the classification set forth above.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

This merchandise is subject to a visa requirement only; it does not have a quota.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED MODIFICATION OF CUSTOMS RULINGS RELATING TO THE APPLICABILITY OF SUBHEADING 9802.00.50 TO WOODEN INTERIOR SHUTTERS AND WOODEN FURNITURE KITS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter concerning the applicability of subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS), to wooden interior shutters and wooden furniture kits; solicitation of comments.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify past rulings pertaining to the eligibility of interior wooden shutters and wooden furniture kits for the partial duty exemption under subheading 9802.00.50, HTSUS. Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before October 6, 1995.

ADDRESS: Written comments are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Special Classification and Marking Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch, (202–482–6945).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modifY rulings pertaining to the eligibility of wooden interior shutters and wooden furniture kits for the partial duty exemption under subheading 9802.00.50, HTSUS.

Subheading 9802.00.50, HTSUS, provides for the assessment of duty on the value of repairs or alterations performed on articles sent abroad for that purpose. However, the application of this tariff provision is precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States,* 44 CCPA 27, C.A.D. 631(1956), *aff'd,* C.D. 1752, 36 Cust. Ct. 46 (1956); *Guardian Industries Corporation v. United States,* 3 CIT 9 (1982), Slip Op. 82–4 (Jan. 5, 1982). Subheading 9802.00.50, HTSUS, treatment is also precluded where the exported articles are incomplete for their intended use and the foreign processing operation is a necessary step in the preparation or manufacture of finished articles. *Dolliff & Company, Inc. v. United States,* 66 CCPA 77, C.A.D. 1225, 599 F.2d 1015 (1979).

In *Amity Fabrics, Inc., v. United States,* 43 Cust. Ct. 64, C.D. 2104 (1959), "pumpkin" colored velveteen fabric was sent abroad for redyeing it black since "pumpkin" was not in fashion. The redyeing did not change the use of the fabric and it was offered for sale to the same trade. In that case, the court held that the redyeing constituted an alteration under par. 1615(g) of the Tariff Act of 1930 (the precursor to item 806.20, TSUS, which in turn, is the precursor of subheading 9802.00.50, HTSUS.)

In *Royal Bead Novelty Co. Inc. v. United States,* C.D. 4353, 68 Cust. Ct. 154, 342 F. Supp. 1394 (1972), glass beads were sent abroad for a coating process which imparted an "Aurora Borealis" finish. Both the coated and uncoated beads were used interchangeably in making costume jewelry, however, this "rainbow" finish was currently in fashion while there was a lack of demand for the uncoated beads. The coated beads sold for a price approximately 20 percent higher than the uncoated version. Citing *Amity,* the court found in that case that the processing performed abroad did not change the quality, texture or character of the beads, and held that the foreign operations constituted an alteration under item 806.20, TSUS.

In Headquarters Ruling Letter (HRL) 557161 dated June 28, 1993, "Attachment A", wooden interior shutters were exported to Mexico where they underwent a process of inspection, preparation and application of several coats of paint or stain. This process included light sanding and repairing between applications of paint or stain. Following this process, the shutters were returned to the U.S. where the necessary hardware was attached. The shutters were then packaged and shipped to the purchaser. The manufacturer also sold shutters in an "unfinished" condition, that is, without any application of paint or stain. Such sales amounted to approximately 17 percent of all sales during the period in question.

Relying on *Amity* and *Royal Bead*, we found, in HRL 557161, that the shutters in their "unfinished" condition did not change in function, character or identity as a result of the finishing process in Mexico, since they were able to provide privacy, light and ventilation in their condition as exported. Further, as in *Amity* and *Royal Bead,* the articles were also sold (or offered for sale) in their unfinished condition. Accordingly, we found that the shutters were complete for their intended use when exported to Mexico, and were eligible for the partial duty exemption under subheading 9802.00.50, HTSUS.

In making this determination, we also modified a past ruling, HRL 555093 dated April 26, 1989, "Attachment B," to the extent it disallowed subheading 9802.00.50, treatment to wooden furniture parts also sold in an unfinished condition and sent abroad for staining and lacquering.

In HRL 555093, U.S.-origin woods were cut, shaped and sanded in the U.S. as wooden furniture parts. The wooden parts were then sent to Mexico to be stained, lacquered, put into kits, and packaged for return to the U.S. Some of the kits were also sold "unfinished" (without stain and lacquer) to some of the same retailers who purchased the finished kits. We found in HRL 555093 that the exported articles were incomplete for their intended use when exported to Mexico, and that the staining and lacquering operations were a necessary step in completing the furniture parts for their intended use. Therefore, we held that the staining and lacquering processes constituted operations that exceeded an alteration under subheading 9802.00.50, HTSUS.

Upon reconsideration, it is Customs position that the unpainted and unstained shutters are not complete for their intended use upon exportation, that the painting or staining, which is decorative and acts as a preservative, is a necessary finishing step in completing the shutters for their intended use, and that accordingly, the processing performed abroad is not an alteration under subheading 9802.00.50, HTSUS. We now believe that the facts in this case are distinguishable from the situations presented to the court in Amity and *Royal Bead,* since in each of those cases the exported articles, velveteen fabric and beads, were in a finished condition and intended to be used in that condition upon purchase. The articles in *Amity* and *Royal Bead* were exported for processing only to increase their saleability. In HRL 557161, shutters are also offered for sale or sold in their unfinished condition as exported. However, it is understood that whether the shutters are purchased unfinished because of their lower price, or because of the intention of decorating the articles in a manner not offered by the seller, it is customary for the buyer to complete the final step in the manufacturing process, *i.e.,* applying a preservative coat of paint or stain. Therefore, whether the preservative coating is applied by the manufacturer or the purchaser, the shutters will customarily be used only after this finishing step in the manufacturing process.

In accordance with this change [in position], Customs intends to modify our previous modification in HRL 557161 in connection with HRL 555093, as set forth in "Attachment C" to this document, and to reflect that unfinished shutters sent abroad for painting or staining will not be entitled to the partial duty exemption under subheading 9802.00.50, HTSUS, upon return to the U.S. "Attachment C."

Before taking this action, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 17, 1995.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 28, 1993.

CLA-2 CO:R:C:S 557161 BLS
Category: Classification

SCOTT E. ROSENOW, ESQ.
S. RICHARD SHOSTAK
STEIN SHOSTAK SHOSTAK & O'HARA
1620 L Street, N.W.
Washington, DC 20036-5605

Re: Applicability of subheading 9802.00.50, HTSUS, to wooden shutters sent to Mexico for painting; *Royal Bead; Amity;* modification of HRL 555093; reconsideration and modification of NY 873889.

GENTLEMEN:

This is in reference to a request for reconsideration dated February 22, 1993, on behalf of Ohline corporation, of NY 873889, dated May 26, 1992. You request that wooden interior window shutters sent to Mexico for painting or staining be granted the partial duty exemption under subheading 9802.00.50, HTSUS.

Facts:

Ohline manufactures wooden shutters wholly for use in interior settings, such as in homes or offices. Generally these shutters are custom-made to the purchaser's specifications and requirements. When an order is received for shutters which are to be painted or stained a specific color, the completed shutters are exported to Mexico. In Mexico, the shutters undergo a process of inspection, preparation and application of several coats of paint or stain (hereinafter "paint"). This process includes light sanding and repairing between applications of paint. Following these operations, the shutters are returned to the U.S. where the necessary hardware will be attached. The shutters are then packaged and shipped to the purchaser.

Ohline also sells shutters unpainted, in an "unfinished" condition. While painted shutters constitute the majority of the interior shutters sold in the U.S., counsel notes that the unfinished market constitutes a significant portion of overall sales.

Issue:

Whether the interior wooden shutters will be eligible for the partial duty exemption under subheading 9802.00.50, HTSUS, when imported into the U.S.

Law and Analysis:

Subheading 9802.00.50, HTSUS, provides for the assessment of duty on the value of repairs or alterations performed on articles sent abroad for that purpose. However, the application of this tariff provision is precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States,* 44 CCPA 27, C.A.D. 631 (1956), *aff'd,* C.D. 1752, 36 Cust. Ct 46 (1956); *Guardian Industries Corporation v. United States,* 3 CIT 9 (1982), Slip Op. 82-4 (Jan. 5, 1982). Subheading 9802.00.50, HTSUS, treatment is also precluded where the exported articles are incomplete for their intended use and the foreign processing operation is a necessary step in the preparation or manufacture of finished articles. *Dolliff & Company, Inc. v. United States,* 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978), *aff'd,* 66 CCPA 77, C.A.D. 1225, 599 F.2d 1015 (1979).

In the instant case, you argue that the shutters are complete for their intended use before being exported to Mexico to be painted, and that the processing in Mexico neither destroys the identity of the article nor creates a new or different article of commerce. Specifically, you point out that at the time of exportation. the shutters are ready to perform their function of providing privacy and controlling light and ventilation You note that painting serves only a decorative purpose, and has no effect upon these uses. Accordingly, you contend that unfinished shutters are completed articles of commerce, and that their identity as interior shutters of wood is unaffected by the processing in Mexico.

In Headquarters Ruling Letter (HRL) 555093, dated April 26, 1989, wooden parts of furniture kits were to be sent to Mexico to be stained, lacquered and packaged, and then

returned to the U.S. for retail sale. Some of the kits were sold "unfinished" (without stain or lacquer) to some of the same retailers who purchased the finished kits. We held in that case that the articles were incomplete for their intended use when sent to Mexico for processing.

In *Amity Fabrics v. United States, Inc.*, 43 Cust. Ct. 64, C.D. 2104 (1959), "pumpkin" colored velveteen fabric was sent abroad for redyeing it black since "pumpkin" was not in fashion. The redyeing did not change the use of the fabric and it was offered for sale to the same trade. In that case, the court held that the redyeing constituted an alteration under par. 1615(g) of the Tariff Act of 1930 (the precursor to item 806.20, TSUS, which, in turn, is the precursor of subheading 9802.00.50, HTSUS).

In *Royal Bead Novelty Co. Inc. v. United States*, C.D. 4353, 68 Cust. Ct. 154, 342 F. Supp. 1394 (1972), glass beads were sent abroad for a coating process which imparted an "Aurora Borealis" finish. Both the coated and uncoated beads were used interchangeably in making costume jewelry, however, this "rainbow" finish was currently in fashion while there was a lack of demand for the uncoated beads. The coated beads sold for a price approximately 20 percent higher than the uncoated version.

In relying on the rationale in *Amity Fabrics*, the court stated as follows:

> "* * * the identity of the articles in question was not lost or destroyed in the coating process and no new articles were created; beads came out and beads came back. Moreover, there was no change in the size, shape, or manner of use in making article of jewelry. The sole change was in the finish in that the imported beads now possessed a rainbow-like luster. This did not change their quality, texture, or character."

Accordingly, the court held that the processing abroad constituted an alteration under Item 806.20, TSUS.

Applying the court's reasoning in *Royal Bead*, we find in the instant case that the processing in Mexico constitutes an alteration within the meaning of subheading 9802.00.50, HTSUS. Initially, we note that the use of the shutters, to provide privacy, light and ventilation, is unchanged whether the articles are painted, or remain unfinished. Thus, the articles are complete for their intended use when exported to Mexico. As in *Royal Bead*, the processing abroad results only in a change in appearance of the shutters, but not in function, character, or identity. What is sent abroad are wood interior window shutters, marketable in the condition as exported, and what is returned are the same articles, available to the same class of customers, albeit enhanced in appearance, and priced accordingly. It is noted that, both in *Amity* and in *Royal Bead*, the court relied upon the fact, as in this case, that the exported article was also sold in its condition as exported.

As a result of our determination, the wooden furniture parts in HRL 555093 which are exported for staining, lacquering, and packaging, and are also sold in an unfinished condition, are considered completed articles of commerce at the time of exportation. Accordingly, we new find that the stained and lacquered furniture parts are entitled to the partial duty exemption under subheading 9802.00.50, HTSUS upon importation. HRL 555093 is modified accordingly.

Holding:

Interior wood shutters sent to Mexico for staining or painting and also sold in an "unfinished" condition are eligible for the partial duty exemption under subheading 9802.00.50, HTSUS, upon return to the U.S. This assumes compliance with the documentation requirements of section 10.8, Customs Regulations (19 CFR 10.8). HRL 555093, dated April 26, 1989, is modified to the extent that it disallowed Item 806.20, TSUS (precursor of subheading 9802.00.50, HTSUS) treatment to wooden furniture parts also sold in an "unfinished" condition and sent abroad for staining and lacquering.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 26, 1989.

CLA-2 CO:R:C:V 555093 DBI
Category: Classification
Tariff No. 9802.00.50, HTSUS

MR. MARK D. ALCORN
One Marlton Court
Sacramento, CA 95831

Re: Applicability of subheading 9802.00.50, HTSUS, to wooden parts of furniture kits shipped to Mexico to be stained and lacquered.

DEAR MR. ALCORN:

This is in response to your letter of August 1, 1988, in which you request a ruling concerning the applicability of item 806.20, Tariff Schedules of the United States (TSUS), to certain wooden parts of furniture kits which will be shipped to Mexico to be stained, lacquered and packaged.

Facts:

You advise that U.S. origin woods will be cut, shaped and sanded in the U.S. in preparation for the application of a wood finish. The wooden parts along with stains, lacquers, and prelabelled retail kit boxes will be shipped to Mexico.

In Mexico, the wooden parts will be stained, lacquered and put into kits, and then returned to the U.S. for retail sale. You note that some articles are sold "unfinished" (without stain and lacquer) to some of the same retailers who purchase the finished kits.

Issue:

Whether the described wooden furniture parts, when returned to the U.S. will be eligible for the partial exemption from duty provided for in subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS) (806.20, TSUS).

Law and Analysis:

As you are probably aware, the HTSUS replaced the TSUS, on January 1, 1989. Item 806.20, TSUS, was carried over into the HTSUS as subheadings 9802.00.40 (repairs or alterations made pursuant to warranty) and 9802.00.50 (other repairs or alterations). A copy of the pertinent provisions is enclosed for your information. These provisions provide for the assessment of duty on the value of repairs or alterations performed on articles returned to the U.S. after having been exported for that purpose. However, the application of these tariff provisions is precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. See A.F. Burstrom v. United States, 44 CCPA 27, C.A.D. 631 (1957); Guardian Industries Corporation v. United States, 3 CIT 9, Slip. Op. 82–4 (Jan. 5, 1982). Treatment under subheadings 9802.00.40 and 9802.00.50, HTSUS, also is precluded where the exported articles are incomplete for their intended use and the foreign processing operation is a necessary step in the preparation or manufacture of finished articles. Dolliff and Company, Inc. v. United States, 66 CCPA 77, C.A.D. 1225, 599 F.2d 1015 (1979).

We have previously held in a ruling dated June 28, 1988 (HQ 555002), that item 806.20, TSUS, was precluded where door knobs and rosettes were sent to Mexico for electroplating through a liquid bath process and spray lacquering. As you will note from the enclosed copy, we reasoned that the exported articles were incomplete for their intended use and the electroplating and lacquering were a necessary step in the preparation of the finished product.

In the present case, the wooden furniture parts will be incomplete when they are sent to Mexico for finishing operations, namely the staining and lacquering. That some of the same retailers who purchase the stained and lacquered furniture parts also buy furniture kits containing parts that have not been stained or lacquered, does not change the fact that these foreign processing operations are necessary to the preparation of the finished articles. Therefore, the staining and lacquering processes constitute operations that exceed an alteration based on the Dolliff decision.

Holding:

On the basis of the information submitted, it is our opinion that the foreign staining and lacquering may not be considered an alteration as that term is used in subheading 9802.00.50, HTSUS, thereby precluding the returned wooden furniture parts from receiving the benefits of this tariff provision.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

S. RICHARD SHOSTAK, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
3580 Wilshire Boulevard
Los Angeles, CA 90010-2597

Re: Reconsideration and modification of HRL 557161; applicability of subheading 9802.00.50, HTSUS, to interior shutters sent to Mexico for painting or staining.

DEAR MR. SHOSTAK:

This is in reference to Headquarters Ruling Letter (HRL) 557161, concerning the applicability of subheading 9802.00.50, Harmonized Tariff Schedule of the United States (HTSUS), to interior wooden shutters returned to the U.S. from Mexico after undergoing a process of painting and staining.

Facts:

Ohline Corporation ("Ohline") manufactures wooden shutters wholly for use in interior settings, such as in homes or offices. Generally these shutters are custom-made to the purchaser's specifications and requirements. When an order is received for painting or staining, the manufactured shutters in an unfinished condition are exported to Mexico, where they undergo a process of inspection, preparation and application of several coats of paint or stain (hereafter "paint"). This process includes light sanding and repairing between applications of paint. Following these operations, the shutters are returned to the U.S. where the necessary hardware will be attached. The shutters are then packaged and shipped to the purchaser.

Ohline also sells shutters in the unfinished condition, without the application of a paint or stain coating. While painted shutters constitute the majority of the interior shutters sold in the U.S., Ohline states that unfinished shutters constitute a significant portion of overall sales. In its submission of June 7, 1994, Ohline also states that 95 percent of the wood shutters it sells are of cedar.

Issue:

Whether the interior wooden shutters are eligible for the partial duty exemption under subheading 9802.00.50, HTSUS, when imported into the U.S.

Law and Analysis:

Subheading 9802.00.50, HTSUS, provides for the assessment of duty on the value of repairs or alterations performed on articles sent abroad for that purpose. However, the application of this tariff provision is precluded in circumstances where the operations performed abroad destroy the identity of the articles or create new or commercially different articles. *See A.F. Burstrom v. United States,* 44 CCPA 27, C.A.D. 631 (1956), *aff'd,* C.D. 1752, 36 Cust. Ct. 46 (1956); *Guardian Industries Corporation v. United States,* 3 CIT 9 (1982), Slip Op. 82-4 (Jan. 5, 1982). Subheading 9802.00.50, HTSUS, treatment is also precluded where the exported articles are incomplete for their intended use and the foreign processing operation is a necessary step m the preparation or manufacture of finished articles. *Dolliff & Company, Inc. v. United States,* 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978), *aff'd,* 66 CCPA 77, C.A.D. 1225, 599 F.2d 1015 (1979).

In *Amity Fabrics v. United States, Inc.,* 43 Cust. Ct. 64, C.D. 2104 (1959), "pumpkin" colored velveteen fabric was sent abroad for redyeing it black since "pumpkin" was not in fashion. The redyeing did not change the use of the fabric and it was offered for sale to the same trade. In that case, the court held that the redyeing constituted an alteration under par. 1615(g) of the Tariff Act of 1930 (the precursor to item 806.20, TSUS, which, in turn, is the precursor of subheading 9802.00.50, HTSUS).

In *Royal Bead Novelty Co. Inc. v. United States,* C.D. 4353, 68 Cust. Ct. 154, 342 F. Supp. 13.94 (1972), glass beads were sent abroad for a coating process which imparted an "Aurora Borealis" finish. Both the coated and uncoated beads were used interchangeably in making costume jewelry, however, this "rainbow" finish was currently in fashion while there was a lack of demand for the uncoated beads. The coated beads sold for a price approximately 20 percent higher than the uncoated version. Citing *Amity Fabrics,* the court in *Royal Bead* held that the processing abroad did not change the quality, texture or character of the beads, and that the the foreign operations constituted an alteration under item 806.20, TSUS (predecessor of subheading 9802.00.50, HTSUS).

In HRL 557161, we relied on the rationale set forth in *Amity* and *Royal Bead* and found that the shutters in their "unfinished" condition did not change in function, character or identity as a result of the finishing process in Mexico, since they were able to provide privacy, light and ventilation in their condition as exported. Further, we noted that as in *Amity* and *Royal Bead,* the shutters were also sold (or offered for sale) in their condition as exported. Therefore, we found that the shutters were complete for their intended use when exported to Mexico, and were eligible for the partial duty exemption under subheading 9802.00.50, HTSUS.

As a result of our holding in HRL 557161, we also modified HRL 555093 dated April 23,1989, to the extent it disallowed item 806.20, TSUS (precursor of subheading 9802.00.50, HTSUS), treatment to unassembled wooden furniture parts (kits) sent abroad for staining and lacquering. As in HRL 557161, the unfinished furniture kits were also sold in their condition as exported.

Upon further consideration, we find that in their condition as exported, the unpainted and unstained shutters are not complete for their intended use, and therefore are not entitled to the preferential tariff treatment under subheading 9802.00.50, HTSUS. We believe the facts in this case are distinguishable from the situations presented to the court in *Amity* and *Royal Bead,* since in those cases, the exported articles (velveteen fabric and beads) were in a finished condition when offered for sale, and were intended to be used by the buyer in their condition as purchased. In the instant case, however, it is understood that whether for reasons of economy or to finish the articles in a manner not offered by the seller, the purchaser acquires unfinished shutters with the intention of painting or staining the articles himself (or herself). This finishing step in the production of the shutters is performed not only to enhance the appearance of the article, but also serves to preserve the integrity of the wood. Whether constructed of cedar or of a more porous wood, it is Customs belief that interior wooden shutters purchased in an unfinished condition are customarily painted or stained by the purchaser and therefore used in this condition. We find it irrelevant whether the process of painting or staining is performed by the manufacturer or by the purchaser, since in either instance this final step is required to complete the article for its intended use.

Holding:

Painting or staining of interior wood shutters in Mexico constitutes a finishing step in the completion of the finished article. Therefore, the shutters are incomplete for their intended use in their condition as exported, and are not entitled to the partial duty exemption under subheading 9802.00.50, HTSUS, upon return from Mexico. HRL 557161 is hereby modified. As a result of this decision, we are modifying our previous modification of HRL 555093, dated April 23, 1989. It is now Customs position that the staining and lacquering abroad of furniture parts under the facts in HRL 555093 is not an alteration under subheading 9802.00.50, HTSUS.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF COMPACT DISK LENS CLEANING SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a compact (CD) Lens Cleaning System. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before October 6, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000 Washington, DC.

FOR FURTHER IN FORMATION CONTACT: Robert Altneu, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a compact disk (CD) Lens Cleaning System.

In DD 807509, issued on March 30, 1995, by the District Director of Customs, Nogales, Arizona, a CD Lens Cleaning System was classified under subheading 8522.90.75, Harmonized Tariff Schedule of the United States (HTSUS), as parts and accessories of apparatus of heading 8519 to 8521 (i.e., CD players). DD 807509 is set forth in "Attachment A" to this document.

Based upon examination of the literature and the variety of uses in different machines such as CD player, CD-ROM (compact disk-read only memory) drive for a computer, and a CD-ROM video game system, Customs Headquarters is of the opinion that the merchandise is not solely or principally used with any of the above-mentioned articles.

Therefore, classification as an accessory solely or principally used with any of the articles is precluded. The CD Lens Cleaning System is a composite good, with the essential character being a compact disk. It is classifiable under subheading 8524.90.40, HTSUS, which provides for other recorded media. This position is consistent with the interpretation of Legal Note 6 to chapter 88, HTSUS.

Customs intends to revoke DD 807509 to reflect the proper classification of the CD Lens Cleaning System under subheading 8524.90.40, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling 957965 modifying DD 807509 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 16, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Nogales, AZ, March 30, 1995.
CLA-2-85:S:N:N1:B21
Category: Classification
Tariff No. 8522.90.7580

MS. MARGARET NOBLE
PERFECTDATA CORPORATION
110 W. Easy Street
Simi Valley, CA 95065

Re: The tariff classification of a CD lens cleaning system from Taiwan.

DEAR MS. NOBLE

In your letter dated December 30, 1994 you requested a tariff classification ruling. The product in question is a CD Lens Cleaning System. The system consists of a CD Lens Cleaner, Storage case and instructions for use. The CD Lens Cleaner contains precision-engineered lens cleaning brushes that remove impairing debris from the optical lens within a CD player or drive.

The applicable subheading for the CD Lens Cleaning System will be 8522.90.7580, Harmonized Tariff Schedule of the United States (HTS), which provides for parts and accessories of apparatus of headings 8519 to 8521. The rate of duty will be 3.5%.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs Officer handling the transaction.

BRIAN M. SWEENY,
(for Rudy Cole, Acting District Director,
Nogales, Arizona.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:M 957965 RFA
Category: Classification
Tariff No. 8524.90.40

MS. MARGARET NOBLE
PERFECT DATA
110 West Easy Street
Simi Valley, CA 93065–1689

Re: CD lens cleaner; accessory for computer; accessory for CD player; accessory for video games; compact disk; brushes; composite good; essential character; GRI 3(b); Legal Note 6 to Chapter 85; Headings 8473, 8522, 9504, 8524, 9603; HQs 950925, 952154, 956490, 956960; DD 807509, revoked.

DEAR MS. NOBLE:

In a letter dated May 9, 1995, you requested reconsideration of DD 807509, issued on March 30,1995, by Customs in Nogales, Arizona, in which the tariff classification of a compact disk (CD) Lens Cleaning System was determined under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response.

Facts:

The merchandise, labeled as a compact disk (CD) Lens Cleaning System, consists of a CD with two, small precision-engineered lens cleaning brushes (measuring 118″ long and 7/16″ long), a storage case, and instructions for use. The CD with the attached brushes is placed in a CD player or CD-ROM (compact disk-read only memory) drive to remove impairing debris from the optical lens within the player or drive.

In DD 807509, issued on March 30, 1995, Customs in Nogales, Arizona, classified the CD Lens Cleaning System under subheading 8522.90.75, HTSUS, which provides for parts and accessories of apparatus of headings 8519 to 8521, HTSUS. You claim that the CD Lens Cleaning System should be classified under subheading 8473.30.50, HTSUS, as parts and accessories of headings 8469 to 8472, HTSUS. In the process of researching this issue, we found that the subject merchandise can also be used to clean CD-ROM video games.

Issue:

Is the CD Lens Cleaning System classifiable as an accessory to computers under heading 8473, as an accessory to a CD player under heading 8522, as an accessory to a video game under heading 9504, or elsewhere under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

The subheadings under consideration are as follows:

8473.30.50: Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472: Parts and accessories of the machines of heading 8471: Not incorporating a cathode ray tube: [o]ther: [o]ther * * *

Goods classifiable under this provision have a general, column one rate of duty of free.

8522.90.75: Parts and accessories of apparatus of headings 8519 to 8521: [o]ther: [o]ther: [o]ther * * *

Goods classifiable under this provision have a general, column one rate of duty of 3.5 percent *ad valorem*.

9504.10.00: Articles for arcade, table or parlor games, including pinball machines, bagatelle, billiards and special tables for casino games; automatic bowling alley equipment; parts and accessories thereof: Video games of a kind used with a television receiver and parts and accessories thereof * * *

Goods classifiable under this provision have a general, column one rate of duty of free.

8524.90.40: Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of chapter 37: [o]ther: [o]ther * * *

Goods classifiable under this provision have a general, column one rate of duty of 7.8 cents per square meter of recording surface.

9603.50.00: Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorized, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees): [o]ther brushes constituting parts of machines, appliances or vehicles * * *

Goods classifiable under this provision have a general, column one rate of duty of 2.7 percent *ad valorem*.

You indicate that because your products are sold to the computer industry, the subject merchandise should be classifiable under heading 8473, HTSUS, as parts and accessories for computers. The CD Lens Cleaning System is not considered a "part" as it is not a necessary component needed for the functioning of a CD player or CD-ROM drive.

In HQ 087704, dated September 27,1990, this office considered the classification of "accessories" under the HTSUS, and stated as follows:

> The term "accessory" is not defined in either the tariff schedule or the Explanatory Notes. An accessory is generally an article which is not necessary to enable the goods with which it is used to fulfill their intended function. An accessory must be identifiable as being intended solely or principally for use with a specific article. Accessories are of secondary importance, not essential in and of themselves. They must, however, somehow contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the range of its uses, or improve its operation).

The CD Lens Cleaning System is an "accessory" which can be used with a CD music player, a CD-ROM drive for a personal computer, and for a video game. Because the subject merchandise can be used for more than one article, we find that its principal or sole use cannot be determined for classification purposes based upon GRI 1. Therefore, classification under headings 8473, 8522, and 9504, HTSUS, is precluded.

Because classification in a single heading cannot be determined by applying GRI 1, we must apply the other GRI's. GRI 2(a) is not applicable here because the merchandise is not incomplete or unfinished. The subject merchandise essentially consists of a compact disk with brushes attached to the underneath surface of the disk. According to the information provided, the compact disk has "On-Disc" voice instructions and music to explain the cleaning process while in use. Compact disks with recorded media are *prima facie* classifiable under heading 8524, HTSUS. Brushes are *prima facie* classifiable under heading 9603, HTSUS. GRI 2(b) states that if a product is a mixture or combination of materials or substances that are, *prima facie*, classifiable in two or more headings, then GRI 3 applies.

GRI 3(a) states that if a product is classifiable in two or more headings by application of GRI 2(b), then the:

> heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Because the CD and the brushes fall under separate headings in the tariff schedule which describe only a portion of the CD Lens Cleaning System, the headings are to be regarded as equally specific under GRI 3(a). Therefore, GRI 3(a) fails in establishing classification, and GRI 3(b) becomes applicable.

GRI 3(b) provides that composite goods consisting of different materials or made up of different components, shall be classified as if they consisted of the material or component which gives them their essential character. The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the HTSUS. While not legally binding, the ENs provide a commentary on the scope of each

heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 FR 35127, 35128 (August 23, 1989). EN IX to GRI 3(b), page 4, states

> [f]or the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts. (emphasis in original)

Because the item is a composite good, we must determine which component provides the essential character. EN VIII to GRI 3(b), page 4, states that the factors will

> vary as between different kinds of goods to determine the essential character of an article. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

We believe that the CD imparts the essential character of the merchandise because it makes up the bulk and weight of the merchandise and it is the component which interacts with the CD player, drive or video game. Therefore, we find that the CD Lens Cleaning System is classifiable under heading 8524, HTSUS, because it plays voice instructions and music.

Classification of the subject merchandise under this provision is supported by Legal Note 6 to Chapter 85, HTSUS, which states that: "[r]ecords, tapes and other media of heading 8523 or 8524 remain classified in those headings, whether or not they are entered with the apparatus for which they are intended." In classifying retail sets containing media of heading 8523 or 8524, HTSUS, Customs has interpreted the meaning of Legal Note 6 to Chapter 85, HTSUS, as requiring that the media is to be broken out from a retail set and classified separately. *See* HQ 952154 (November 17, 1992); HQ 950925 (May 12, 1992). In these situations, the essential character of the retail sets, which contained the media of headings 8523 or 8524, HTSUS, were held to be other than the media. In situations where the essential character of the retail set is the media, Customs has found that Legal Note 6 to Chapter 85, HTSUS, allows for a retail set, whose essential character is the media, to be classified as media. *See* HQ 956960 (September 19, 1994); HQ 956490 (August 19,1994). We believe that Legal Note 6 to Chapter 85, HTSUS, allows for composite goods consisting of the media of heading 8523 or 8524, HTSUS, to be classified under these provisions.

Based upon the above analysis, DD 807509 should be revoked.

Holding:

The CD Lens Cleaning System is classifiable under subheading 8524.90.40, HTSUS, which provides for: "[r]ecords, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of chapter 37: [o]ther: [o]ther * * *." The general, column one rate of duty is 7.8 cents per square meter of recording surface.

Effect on Other Rulings:

DD 807509, issued on March 30, 1995, is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF A CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF THE "YAK BAK" SOUND RECORDING DEVICE

ACTION: Notice of proposed revocation of a tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the "Yak Bak" sound recording device. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before October 6, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the "Yak Bak" sound recording device. In NY 804205, issued on December 13, 1994, the "Yak Bak" was held to be classifiable under subheading 9503.90.60 (now, 9503.90.00), HTSUS, which provides for other toys (except models), not having a spring mechanism. NY 804205 is set forth in Attachment A to this document. Customs Headquarters is of the opinion that the "Yak Bak" is not a "toy," and is classifiable under subheading 8520.90.00, HTSUS, which provides for other sound recording apparatus.

Customs intends to revoke NY 804205 to reflect the proper classification of the "Yak Bak." Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling 958302 revoking NY 804205 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: August 14, 1995.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 13, 1994.

CLA-2-95:S:N:N8:225 804205
Category: Classification
Tariff No. 9503.90.6000

MS. SANDRA SWANSON
ALROD INTERNATIONAL, INC.
880 Stanton Road
Burlingame, CA 34010

Re: The tariff classification of a toy recording device from China.

DEAR MS. SWANSON:

In your letter dated November 1, 1994, received in this office on November 15, 1994, you requested a tariff classification ruling on behalf of your client Yes! Entertainment Corp.

A sample of the article called "Yak Bak" was received with your inquiry. The item is a small recording device which fits in the palm of your hand. The user talks into a speaker/ microphone while pressing down a button located on the device. One may record up to a 6 second message. Another button activated playback of the recorded message.

The "Yak Bak" is capable of a "limited use" it is distinguishable by its size, construction and limited capacity from real recording apparatus. This office finds the time qualifies for the toy provision.

The applicable subheading for the "Yak Bak" will be 9503.90.6000, Harmonized Tariff Schedule of the United States (HTS), which provides for other toys (except models), not having a spring mechanism. The rate of duty will be 6.8 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:M 958302 LTO
Category: Classification
Tariff No. 8520.90.80

MS. SANDRA SWANSON
ALROD INTERNATIONAL, INC.
880 Stanton Road
Burlingame, CA 94010

Re: "Yak Bak" sound recording device; NY 804205 *revoked;* NY 809199; HQs 087599, 956261; Section XVI, note 1(p); heading 9503; EN 85.20; General EN to chapter 95.

DEAR MS. SWANSON:

This is in reference to NY 804205, issued to you, on behalf of Yes! Entertainment Corp., on December 13, 1994, which concerned the classification of the "Yak Bak" sound recording device under the Harmonized Tariff Schedule of the United States (HTSUS). A further review of the issue has caused us to reconsider this ruling.

Facts:

The article in question is called the "Yak Bak," which is a small recording device which fits in the palm of the user's hand. The user talks into a speaker/microphone while pressing down a button located on the device to record a six second message. Another button activates playback of the recorded message.

Issue:

Whether the "Yak Bak" is classifiable as a toy under heading 9503, HTSUS, or as sound recording and reproducing apparatus under heading 8520, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The headings under consideration are as follows:

8520	Magnetic tape recorders and other sound recording apparatus, whether or not incorporating a sound reproducing device
9503	Other toys * * *

In NY 804205, dated December 13, 1994, the "Yak Bak" was held to be classifiable under subheading 9503.90.60 (now, 9503.90.00), HTSUS, which provides for other toys (except models), not having a spring mechanism. Note 1(p) to section XVI, HTSUS, states that the section, which includes heading 8520, HTSUS, does not include articles of chapter 95, HTSUS. Thus, if the "Yak Bak" is classifiable under heading 9503, HTSUS, it cannot be classified under heading 8520, HTSUS.

With regard to heading 9503, HTSUS, the ENs to Chapter 95, pg. 1585, indicate that "this chapter covers toys of all kinds whether designed for amusement of children or adults." It has been Customs position that the amusement requirement means that toys should be designed and used principally for amusement. *See* HQ 956261, dated May 26, 1994; Additional U.S. Rule of Interpretation 1(a), HTSUS. In our opinion, the "Yak Bak" does not provide the manipulative play value or frivolous entertainment characteristic of toys. Further, any amusement derived from the "Yak Bak" is incidental to the device's utilitarian purpose. *See* HQ 087599, dated March 5, 1991. Thus, the device is not "designed and used principally for amusement," and is not classifiable under heading 9503, HTSUS.

With regard to heading 8520, HTSUS, EN 85.20, pg. 1368, states that the heading "covers **all** sound recording apparatus, whatever the purpose for which it is intended * * * [and]

includes sound recording apparatus, incorporating a sound reproducing device [emphasis added]." The "Yak Bak," though not a sophisticated device, functions as sound recording and reproducing apparatus. Accordingly, the "Yak Bak is classifiable under heading 8520, HTSUS, specifically under subheading 8520.90.00, HTSUS. *See* NY 809199, dated May 3,1995 (wherein "Pocketalkers," similar voice recording and playback devices, were held to be classifiable under subheading 8520.90.00, HTSUS).

Holding:

The "Yak Bak" is classifiable under subheading 8520.90.00, HTSUS, which provides for other sound recording apparatus, whether or not incorporating a sound reproducing device, HTSUS. The corresponding rate of duty for articles of this subheading is 3.1% *ad valorem*.

Effect on Other Rulings:

NY 804205, dated December 13, 1994, is *revoked*.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–146)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92–07–00505

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record. Plaintiffs specifically object to the following actions of the Department of Commerce, International Trade Administration ("Commerce"): (1) use of best information available where plaintiff failed to provide cost of production data for home market prototype models; (2) application of best information available to scope products which were sold to a U.S. affiliate which incorporated the products into non-scope finished merchandise; (3) exclusion of the provision for doubtful debt from the home market indirect selling expenses; (4) application of the difference in merchandise test; and (5) failure to add direct selling expenses to foreign market value.

Held: Plaintiffs' motion is granted and this case is dismissed.

[Plaintiffs' motion is granted and this case is dismissed.]

(Dated August 16, 1995)

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, T. George Davis, Robert A. Calaff and *Niall P. Meagher)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Stephen J. Claeys, Stacy J. Ettinger* and *Dean A. Pinkert,* Attorneys, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Lane S. Hurewitz, Patrick J. McDonough and *John M. Breen)* for defendant-intervenor, The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and Joseph A. Perna) for defendant-intervenor, Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), challenge certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of the administrative review of certain antifriction roller bear-

ings ("AFBs") from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 28,360 (June 24, 1992); as amended, *Antifriction Roller Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 59,080 (December 14, 1992) (collectively, *"Final Results").*

Background

On May 15, 1989, Commerce published antidumping duty orders which covered the subject merchandise. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (May 15, 1989). On March 31, 1992, Commerce published the preliminary results of its second administrative reviews, for the period May 1, 1990 to April 30, 1991. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 57 Fed. Reg. 10,859 (March 31, 1992).

On June 24, 1992, Commerce published the final determination of its second administrative review, *Antifriction Roller Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 28,360 (June 24, 1992), which was later amended by *Antifriction Roller Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 59,080 (December 14, 1992).

Koyo moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record, alleging the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) use of best information available ("BIA") where Koyo failed to provide cost of production ("COP") data for home market prototype models; (2) application of BIA to scope products which were sold to a U.S. affiliate which incorporated the products into non-scope finished merchandise; (3) exclusion of the provision for doubtful debt from the home market indirect selling expenses; (4) application of the difference in merchandise "difmer" test; (5) failure to add direct selling expenses to foreign market value ("FMV"). *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Judgment on the Agency Record ("Koyo's Brief")* at 3–6.

Discussion

The Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by Commerce in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Missing Cost of Production Data:*

Koyo contends that Commerce improperly resorted to BIA to calculate the dumping margins for any U.S. sale that matched to home market models for which COP data was missing or that matched to a "family" of home market models if COP for any model within that family was missing. In addition, Koyo asserts Commerce applied an unreasonable BIA because Koyo failed to provide only a small amount of cost data for very few home market models (an "extremely insignificant portion of the COP data") and because the absence of the data would have had virtually no impact on its margin calculation. Koyo states Commerce acted inconsistently by applying a punitively high margin rate for all U.S. sales which matched either the individual home market models which included the sub-models with missing COP data or the entire home market families that included those models. Further, Koyo maintains the factors distinguishing the models lacking COP data from other home market bearing sub-models comprising a given model accounted for no more than a "nominal cost difference." *1990–1991 AFB Questionnaire* at 41–42; *Koyo's Brief* at 12–20.

Commerce responds that it correctly resorted to BIA because Koyo failed to provide pertinent data and that it properly used Koyo's rate from the less-than-fair value ("LFTV") investigation as BIA. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Brief")* at 14–24.

Defendant-intervenor The Torrington Company ("Torrington") and defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") agree with Commerce's position on this issue. *Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Torrington's Brief")* at 14–22; *Opposition of Federal-Mogul Corporation, Defendant-Intervenor, to Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record ("Federal-Mogul's Brief")* at 7–13.

Section 1677e(c) of Title 19, U.S.C., states that Commerce "shall, whenever a party * * * refuses or is unable to produce information requested in a timely manner * * * use the best information otherwise available."

Koyo's argument that Commerce improperly applied BIA because Koyo failed to provide only a very insignificant portion of the data requested is without merit. The BIA provision applies regardless of the amount of lacking information. *See* 19 U.S.C. § 1677e(c).

For purposes of this administrative review, Commerce required that Koyo provide complete COP data for all reported home market sales. *1990–1991 AFB Questionnaire; Koyo's Brief* at 12. It is undisputed that Koyo did not provide all the information that had been requested. Therefore, BIA was correctly applied because Commerce specifically requested Koyo to provide COP data and Koyo failed to do so. *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984), *cited in, U.H.F.C. Co. v. United States,* 13 CIT 119, 129, 706 F. Supp. 914, 922 (1989), *aff'd in part, rev'd in part,* 916 F.2d 689 (Fed. Cir. 1990), *vacated and remanded,* 14 CIT 753 (1990); *see also, Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1190 (Fed. Cir. 1993).

Upon review, this Court finds that Commerce properly selected Koyo's LTFV investigation rate as BIA. The Court finds that the antidumping statute is silent as to what constitutes best information available. 19 U.S.C. § 1677e (1988). Because Congress explicitly left a gap for the agency to fill, it is within Commerce's discretion to decide what constitutes best information available in a particular case and this Court must grant that decision considerable deference. *Allied-Signal Aerospace,* 996 F.2d at 1191–92. It is therefore within Commerce's discretion to choose BIA adverse to noncooperating parties. *Saha Thai Steel Pipe Co. v. United States,* 17 CIT ___, ___, 828 F. Supp. 57, 62–64 (1993).

This Court finds that Commerce exercised its discretion in this matter reasonably and in accordance with law. Commerce explained its choice of BIA:

> Koyo failed to provide COP information for certain models. We will use Koyo's reported data to the extent possible for calculating cost of production. However, where those models for which no COP information was provided are shown to be the most appropriate match for a U.S. sale, we have applied Koyo's rates of 73.55 percent for BBs and 51.21 percent for CRBs from the LTFV investigation as BIA. In addition, where any of these models belonged to a family which was used as a match, these BIA rates were applied to the family.

Final Results, 57 Fed. Reg. at 28,386.

Therefore, this Court finds that Commerce's application and choice of BIA in this case is supported by substantial evidence and in accordance with law and is hereby affirmed.

2. *"Roller Chain" Exclusions:*

Koyo asserts Commerce acted contrary to law by applying BIA to certain of Koyo's claimed "Roller Chain" exclusions.[1] Koyo argues it has been unreasonably punished for its inability to obtain information from a U.S. affiliate who refuses to provide information to Koyo and whose corporate relationship to Koyo is extremely tenuous. Koyo also requests

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[1] Imports of scope merchandise are not subject to antidumping duties if they comprise less than one percent of the sales value of the finished product sold to unrelated customers in the United States. *See Roller Chain, Other Than Bicycle, From Japan; Final Results of Administrative Review of Antidumping Finding,* 48 Fed. Reg. 51,801, 51,804 (Nov. 14, 1983).

that Commerce not apply the "Roller Chain" principle so rigidly, asserting its "Roller Chain" exclusion denied by Commerce exceeded the one percent threshold by only "a tiny amount." In addition, Koyo contends the BIA rate, the BIA rate applied to Koyo in the LTFV investigation, had a dramatically disproportionate impact on Koyo's dumping margin in this review. *Koyo's Brief* at 20–36.

Commerce responds that it properly decided to apply BIA for the transactions which Koyo inappropriately claimed as "Roller Chain" transactions. Commerce states it accepted some of Koyo's claimed exclusions, but could not accept those which fell below the threshold or for which Koyo did not furnish appropriate data. Accordingly, in those cases, Commerce resorted to BIA. Commerce asserts its choice of BIA was proper and that there is nothing necessarily punitive about the use of rates from previous segments of the proceeding. *Defendant's Brief* at 24–34. Defendant-intervenors agree with the position taken by Commerce.

This Court finds that Commerce properly denied a "Roller Chain" exclusion in this case: the claimed exclusion in dispute exceeds the one percent threshold established by Commerce. *Final Results,* 57 Fed. Reg. at 28,378; *see Roller Chain,* 48 Fed. Reg. at 51,804.

It is undisputed that Commerce instructed Koyo to provide information regarding imported scope products (bearings and bearing parts) that were sold to U.S. affiliates that used those products to manufacture merchandise outside the scope of the order before the first sale to an unrelated customer. *1990–1991 Questionnaire at 11.* It is also undisputed that Koyo failed to provide the information requested. *Koyo's Brief* at 26–31. Therefore, the application of BIA is appropriate under these circumstances. *See discussion of issue no. 1, supra.*

Koyo's argument that its tenuous relationship with its affiliate prevents Koyo from providing the requested information is without merit. The BIA provision applies regardless of the non-complying party's reason for non-compliance. *See* 19 U.S.C. § 1677e(c) (Commerce "shall, whenever a party * * * refuses *or is unable* to produce information requested * * * use the best information otherwise available.") (Emphasis added.)

It is also undisputed that the BIA rate used by Commerce, that applied to Koyo in the LTFV investigation, is the highest rate previously applied to Koyo. *Koyo's Brief* at 30. Koyo's argument that Commerce's choice of BIA is improper is also without merit. *See discussion of issue no. 1, supra.* This Court finds that Commerce exercised its discretion in this matter reasonably and in accordance with law. Commerce explained its choice of BIA:

> When a company substantially cooperated with our requests for information * * * but failed to provide the information requested in a timely manner or in the form required, we used as BIA the higher of (1) the highest rate * * * ever applicable to the firm for the same class or kind of merchandise from either the LTFV investigation or a prior administrative review; or (2) the highest calculated rate in

> this review for the class or kind of merchandise for any firm from the same country of origin.

Final Results, 57 Fed. Reg. at 28,379.

Therefore, this Court finds that Commerce's denial of a "Roller Chain" exclusion and application and choice of BIA in this issue is supported by substantial evidence and in accordance with law and is hereby affirmed.

3. *Indirect Selling Expenses for Doubtful Debt:*

Koyo contends Commerce unlawfully excluded Koyo's provision for doubtful debt from home market indirect selling expenses. Koyo alleges Commerce did so contrary to Commerce's previous practice and to judicial precedent. Koyo cites *AOC Int'l, Inc., Fulet Elec. Indus. Co., Sampo Corp., and Tatung Co. v. United States,* 13 CIT 716, 721 F. Supp. 314 (1989), and *Daewoo Electronics Co. v. United States,* 13 CIT 253, 712 F. Supp. 931 (1989), *aff'd in part and rev'd in part, remanded,* 6 F.3d 1511 (Fed. Cir. 1993), for the proposition that this Court should specifically require Commerce to accept a bad debt reserve as an indirect selling expense. *Koyo's Brief* at 36–39.

Commerce argues it properly excluded Koyo's claimed expenses for doubtful debt. Commerce states it had requested clarification as to whether Koyo's initial response for allowance for bad debts represented money that was set aside to cover doubtful accounts or whether it represented actual losses. Based on Koyo's response that it represented monies "set aside," *Koyo's Supplemental Response, Public Doc. 493* at 44–45, Commerce denied Koyo's claim for an adjustment. Commerce distinguished between actual losses and cash reserves for bad debt. *Defendant's Brief* at 34–38. Defendant-intervenors concur with defendant.

The Court agrees with Commerce's argument. While it is Commerce's practice to make allowance for bad debt that is incurred on the sale of subject merchandise, this is not the case here. The case at bar involves a reserve account, an amount set aside for doubtful accounts, *not* actual losses due to bad debt. Accordingly, Commerce denied the provision from home market indirect selling expenses. Commerce explained:

> The Department considers bad debt that is actually incurred on the sale of subject merchandise during the period of review to be either a direct or indirect selling expense depending on the relationship between the bad debt expense and the sale * * *. However, in this case, Koyo has claimed an amount in a reserve account which is set aside in the event that an actual expense is incurred. Koyo has shown no relationship between this account and actual sales. Therefore, we have disallowed Koyo's doubtful debt expense for these final results.

Final Results, 57 Fed. Reg. at 28,412.

It is for this reason as well that Koyo's reliance *AOC* and *Daewoo* is misplaced. These cases involve bad debt expenses (actual losses previously incurred by respondents) not, as in this case, bad debt reserves (cash set aside in the event an actual bad debt expense is incurred in the

future). *AOC,* 13 CIT 716, 721 F. Supp. 314, and *Daewoo,* 13 CIT 253, 712 F. Supp. 931.

Because Koyo has failed to show that it incurred actual bad debt losses or that any relationship exists between its doubtful debt account and sales of subject merchandise, this Court finds Commerce properly excluded Koyo's claimed expenses for doubtful debt from home market indirect selling expenses and hereby affirms Commerce on this issue.

4. *Difference in Merchandise Test:*

Koyo asserts Commerce erred in applying the twenty percent difference in merchandise ("difmer") cap, by failing to determine whether the difference between the variable cost of manufacturing ("VCOM") of the U.S. model and the VCOM of each model in the home market "family" of models matched to that U.S. model exceeded twenty percent of the VCOM of the U.S. model. Koyo contends Commerce thus failed to eliminate "outlying" models from the home market family and to ensure that the family consisted only of models that were of equivalent commercial value, as required by the statutory definition of similar merchandise in 19 U.S.C. § 1677(16) (1988). According to Koyo, Commerce's methodology was flawed because Commerce calculated a single VCOM for each bearing family and used this figure for the entire family match against the VCOM of the individual U.S. model. Koyo states Commerce should have applied the resulting difmer cap to each of the bearing models within each home market "family" of bearings. *Koyo's Brief* at 39–41.

Commerce contends its methodology of applying a twenty percent difmer test for comparing a bearing sold in the U.S. and a family of bearings sold in the home market is reasonable and in accordance with law. Commerce asserts its use of a bearing family's weighted-average VCOM to apply the difmer test ensures that all of the bearings within the family, as a whole, are comparable to the U.S. bearing. *Defendant's Brief* at 4–14.

When identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select "similar" comparison merchandise based upon the physical characteristics of the merchandise being compared. 19 U.S.C. § 1677(16).[2] Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise.

[2] 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purpose of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

E.g., Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

In this review, Commerce developed a "family" matching methodology to identify similar merchandise when there were no foreign market sales of merchandise identical to a U.S. sale. *Defendant's Brief* at 6. For those cases, Commerce determined what constituted "similar merchandise" by grouping bearings into families based upon eight specified physical characteristics. *Final Results* 57 Fed. Reg. at 28,367. In addition, Commerce employed a twenty percent difmer test so that bearings having a greater than twenty percent difference in their VCOM would not be treated as similar. *Id.* When a bearing sold in the U.S. was compared to a family of bearings sold in the home market, the difmer test was applied by comparing the VCOM of the bearing sold in the U.S. with a weighted-average of the VCOM for each of the constituent bearings within the corresponding bearing family. *Id.* Thus, Commerce treated each bearing family as if it were a single model both for identifying the most similar merchandise and for using the sales of the family's constituent bearings in determining FMV. *Defendant's Brief* at 6–7.

Upon review, this Court finds that Commerce's model matching methodology was reasonable and in accordance with law and that Commerce acted within its discretion in its choice of methodology. *See Smith-Corona,* 713 F.2d at 1571. Accordingly, Commerce is hereby affirmed on this issue.

5. *U.S. Direct Selling Expenses:*

Koyo asserts Commerce erred in treating Koyo's U.S. direct selling expenses as a reduction to U.S. price ("USP") rather than an addition to foreign market value on exporter's sales price ("ESP") sales. Koyo's states direct selling expenses should be added to FMV as a matter of law and Commerce acted contrary to the statute and to explicit direction from this Court in deducting them from USP. *SKF's Brief* at 41–43.

While conceding that this Court has ruled adversely to its position on this point, Commerce contends it has acted consistently with 19 U.S.C. § 1677a(e)(2) (1988), rather than adding direct selling expenses to FMV pursuant to the circumstance of sale adjustment contained in 19 U.S.C. § 1677b(a)(4)(B) (1988). *Defendants' Brief* at 38–42.

Commerce's policy has recently been vindicated by the Federal Circuit in *Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A. v. United States,* 36 F.3d 1565 (Fed. Cir. 1994). The Federal Circuit explained Commerce's practice as follows:

> Commerce's practice evidences an attempt to make mirror-image adjustments to foreign market value and exporter's sales price so that they can be fairly compared at the same point in the chain of commerce. The procedure is as follows: In an exporter's sales price transaction, after an initial exporter's sales price is calculated, that value is adjusted, *inter alia,* pursuant to section 1677a(e)(2) by deducting therefrom all selling expenses (both direct and indirect) incurred in making U.S. sales. Then, in determining an initial foreign market value, appropriate sales are identified in the home

> market or third country pursuant to 19 U.S.C. § 1677b(a). Next, the initial foreign market value is adjusted, *inter alia,* by deducting therefrom a "circumstances of sale" amount to account for "any difference between the United States price and the foreign market value," 19 U.S.C. § 1677b(a)(4), for example, direct selling expenses incurred in making home market sales. In this way, the section 1677b(a)(4) adjustment to foreign market value counterbalances the section 1677a(e)(2) adjustment to exporter's sales price. As a result, the two parameters may be compared on equivalent terms.

Koyo Seiko, 36 F.3d at 1573.

The Federal Circuit went on to specifically uphold Commerce's reading of the statute:

> Nothing in the plain language or the legislative history of the Antidumping Act precludes Commerce's approach of adjusting exporter's sales price by deducting therefrom certain direct selling expenses incurred in the United States. Indeed, Commerce's stated rationale for its approach is well within the bounds of reasonableness. Moreover, because we recognize that Commerce is "the 'master' of the antidumping law, worthy of considerable deference," *Daewoo Elecs.,* 6 F.3d at 1516, we defer to its approach.

Id. at 1575.

Accordingly, as the law is now clear that Commerce's methodology of adjusting United States price for selling expenses, both direct and indirect, incurred with respect to ESP sales, is reasonable and in accordance with law, this Court affirms Commerce on this issue.

CONCLUSION

In accordance with the foregoing opinion, this Court, after due deliberation and a review of all papers in this action, finds that Commerce's actions were in accordance with law and supported by substantial evidence. For the reasons stated above, the Final Results are affirmed and plaintiffs' motion is denied in all respects. This case is hereby dismissed.

(Slip Op. 95–147)

AMENDED

ARAMIDE MAATSCHAPPIJ V.O.F. AND AKZO FIBERS INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND E.I. DU PONT DE NEMOURS & CO., INC., DEFENDANT-INTERVENOR

Court No. 94–07–00424

[LTFV determination of the International Trade Administration as to PPD-T aramid fiber from the Netherlands sustained.]

(Dated August 18, 1995)

Adduci, Mastriani, Schaumberg, Meeks & Schill, L.L.P. (Tom M. Schaumberg, Barbara A. Murphy and *Gregory C. Anthes)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Harold D. Lester, Jr.), Boguslawa B. Thoemmes,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Wilmer, Cutler & Pickering (John D. Greenwald and *Ronald I. Meltzer)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2. The motion has been brought by Aramid Products V.o.F. (formerly Aramide Maatschappij V.o.F.) and Akzo Nobel Fibers Inc. (formerly Akzo Fibers Inc.) (collectively "Aramide"), challenging the determination of the International Trade Administration of the United States Department of Commerce ("Commerce") in *Aramid Fiber Formed of Poly-Phenylene [sic] Terephthalamide from the Netherlands,* 59 Fed. Reg. 23,684 (Dep't Comm. 1994) (final determ. of LTFV sales) *("Final Det."),* and in *Aramid Fiber Formed of Poly-Phenylene [sic] Terephthalamide from the Netherlands,* 59 Fed. Reg. 32,678 (Dep't Comm. 1994) (antidumping duty order and amended final determ. of LTFV sales) *("Amended Final Det.").*

BACKGROUND

On July 2, 1993, E.I. Du Pont de Nemours & Company, Inc. ("petitioner" or "Du Pont") filed a petition with Commerce, alleging that an industry in the United States was materially injured or threatened with material injury by reason of less than fair value ("LTFV") imports of poly para-phenylene terephthalamide aramid fiber ("PPD-T aramid fiber") from the Netherlands. Du Pont is the sole U.S. producer of PPD-T aramid fiber, which is a high-performance synthetic fiber with special characteristics that include high strength, resistance to deformation from stretch, high thermal stability, fire resistance, and chemical resistance. *See Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands,* USITC Pub. 2783, Inv. No. 731–TA–652, at I–6 (June 1994) (affirmative final determ.). PPD-T aramid fiber is available in a variety of forms, such as filament yarn, staple fiber, pulp, floc, chopped fiber, and nonwovens. *Final Det.* at 23,685.

Commerce determined that the product under investigation consisted of a "single class or kind of merchandise":

> PPD-T aramid in the form of filament yarn (including single and corded), staple fiber, pulp (wet or dry), spun-laced and spun-based nonwovens, chopped fiber and floc. Tire cord fabric is excluded from the class or kind of merchandise under investigation.

Id. For price comparison purposes, Commerce found three "such or similar" product categories: yarn, staple fiber and pulp. *Id.; see* 19 U.S.C. § 1677(16) (1988) (definition of such or similar merchandise) (current version at 19 U.S.C.A. § 1677(16) (West Supp. 1995)).

Subsequent to its antidumping duty investigation for the period January 1 through June 30, 1993, Commerce issued its final determination on May 6, 1994, concluding that PPD-T aramid fiber imports from the Netherlands were being, or were likely to be, sold in the United States at LTFV. *Final Det.* at 23,684. Aramide, the sole respondent involved in the investigation, challenges certain portions of Commerce's determination. Defendant and petitioner oppose Aramide's motion.

Standard of Review

In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those determinations by Commerce found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C.A. § 1516a(b)(1)(B)(i) (West Supp. 1995)).

Discussion

I. Profit Calculation for Constructed Value:

For the three "such or similar categories" identified in the final determination, Commerce found that no viable home market sales existed for purposes of price comparisons. *Final Det.* at 23,685. Thus, for certain products within a such or similar category, Commerce based foreign market value ("FMV") upon third-country sales of the subject merchandise: Germany for yarn and staple fiber sales, and Japan for pulp sales.[1] *Id.; see also* 19 U.S.C. § 1677b(a)(1)(B) (1988) (FMV may be based upon third-country sales) (current version at 19 U.S.C.A. § 1677b(a)(1)(B)(ii), (C) (West Supp. 1995)). Where sales of certain products were not made above the cost of production ("COP"), Commerce based FMV on constructed value (or "CV"). Third country data was also used for constructed value. *See, e.g., Certain Valves and Connections, of Brass, for Use in Fire Protection Systems from Italy,* 55 Fed. Reg. 50,342, 50,343 (Dep't Comm. 1990) (prelim. results of admin. review) (indicating that Commerce bases selling expenses and profit upon third-country data where no home market data is usable).

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[1] Pursuant to 19 C.F.R. § 353.49(b) (1993), Commerce found Japan to be the appropriate third-market country for pulp sales, as it was Akzo's largest export market for such sales. *See* Def.'s Mem. in Opp'n to Pls.' Mot. J. Upon Agency R. at 22.

In making its constructed value calculation, Commerce is required to include

> an amount for * * * profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade.

19 U.S.C. § 1677b(e)(1)(B) (1988) (current version at 19 U.S.C.A. § 1677b(e)(2) (West Supp. 1995)). The profit amount included in constructed value may not be less than the statutory minimum of eight percent of the sum of cost of materials and general expenses. *Id.* § 1677b(e)(1)(B)(ii). Here, Commerce calculated Aramide's profit on a market-specific basis, using "one average profit for pulp sold in Japan and another for yarn and staple sold in Germany." *Final Det.* at 23,690. As a result, actual profit was used for Germany, and the statutory minimum of eight percent was used for Japan. *Id.* at 23,686.

Aramide contends that Commerce's calculation of profit on a market-specific basis is contrary to the statute, in that the statute requires the profit calculation to be based upon the "same general class or kind" of merchandise. Aramide asserts that a single weighted-average profit percentage derived from all of Aramide's third-country sales should have been used.

The court agrees that, in general, the statute permits an overall profit estimation based upon the "class or kind" of merchandise. 19 U.S.C. § 1677b(e)(1)(B). The issue is whether a single weighted-average profit percentage is required in all cases. As is now axiomatic, considerable weight is to be accorded Commerce's construction of a statutory scheme it is entrusted to administer. *See PPG Indus., Inc. v. United States,* 928 F.2d 1568, 1571–72 (Fed. Cir. 1991) ("[C]ourts must defer to an agency's interpretation of the statute an agency has been charged with administering provided its interpretation is a reasonable one."). Accordingly, the court must determine whether Commerce's market-specific approach is a reasonable and permissible application of the statute.

First, as indicated, Commerce is required to include in constructed value "an amount for * * * profit equal to that *usually* reflected in sales of merchandise of the same *general* class or kind." 19 U.S.C. § 1677b(e)(1)(B) (emphasis added). Here, constructed value was based upon data for the subject merchandise in more than one third-country market. In this particular circumstance, Commerce reasoned that

> it is appropriate to calculate all selling expenses and profit specific to the market in which the products in question were sold rather than average profit across two or more countries.

Final Det. at 23,690. The statute employs broad language and is drafted in terms which permit some adjustment to achieve accuracy in anomalous cases. In this atypical situation of multiple markets, Commerce determined that an accurate profit calculation would be derived by using market-specific data as opposed to data which obscured the link to

sales in a particular market. Thus, two separate profit percentages were generated for the class or kind of merchandise.[2]

Second, assuming, *arguendo,* that a single profit percentage is required, there are a number of ways to derive a single profit figure for a class or kind of merchandise. Nothing in the statute requires a weighted-average profit figure derived from individual sales. In any case, the statute refers to a usual amount for the general class of merchandise. It does not say a single percentage for the class, and it assuredly does not say "a single weighted-average percentage." Thus, plaintiffs' challenge fails as to the profit calculation.

Aramide also contests Commerce's exclusion in the final determination of sales of second-quality merchandise and sales subject to German value-added tax ("VAT") from the profit calculation included in constructed value. Commerce, however, excluded these sales from the FMV calculation in the preliminary determination, reasoning that Aramide had not explained why U.S. sales of first-quality merchandise were appropriate for comparison to second-quality merchandise. *Aramid Fiber Formed of Poly-Phenylene [sic] Terephthalamide from the Netherlands,* 58 Fed. Reg. 65,699, 65,700 (Dep't Comm. 1993) (prelim. determ.). Aramide raised no challenge to Commerce's calculation in this regard until after issuance of the final determination. Further, defendant indicates that the programming language providing for exclusion of these sales in the preliminary determination, and later disclosed to Aramide, did not change from the final determination. Def.'s Mem. in Opp'n to Pls.' Mot. J. Upon Agency R. at 30–31. As Aramide was on notice of Commerce's intended computation, the court concludes that Aramide was required to and failed to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(d) (1988) ("The [CIT] shall, where appropriate, require the exhaustion of administrative remedies."); *see, e.g., Encon Indus., Inc. v. United States,* Slip Op. 94–145, at 3–4 (Sept. 19, 1994) (dismissing challenge to Commerce's "all others" rate calculation where plaintiff failed to submit argument to Commerce in underlying administrative proceedings).

Aramide's claim that it raises a "purely legal" challenge to Commerce's final determination, thus fitting into one of the exceptions to the exhaustion requirement, is without merit.[3] Assuming, *arguendo,* that a purely legal argument may be excepted from normal exhaustion

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[2] In further support of its position, defendant cites *Cellular Mobile Telephones and Subassemblies from Japan,* 54 Fed. Reg. 48,011, 48,012 (Dep't Comm. 1989) (final results), as advancing the proposition that Commerce may calculate profit on a product-specific basis "when such data are more accurate or otherwise more appropriate." This methodology was used in the preliminary determination in that proceeding, however, because of deficient product-specific data for general expenses, Commerce relied upon respondent's more expansive data as to the same general class or kind of merchandise for the final determination. Defendant does not allege that this particular methodology is pertinent to this case. Thus, the court does not address whether a profit calculation on the basis of product-specific data is a permissible construction of the statute.

[3] The cases where the court generally has not required exhaustion of administrative remedies are (1) where plaintiff raised a new argument that was purely legal and required no further agency involvement, (2) where plaintiff did not have timely access to the confidential record, (3) where a judicial interpretation intervened since the remand proceeding, changing the agency result, and (4) where it would have been futile for plaintiff to have raised its argument at the administrative level. *See Budd Co. v. United States,* 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991) (listing cases).

rules,[4] Commerce likely must consider, on remand, other evidence in the record and perform recalculations. Thus, in a strict sense, Aramide's claim is not "purely legal." *See Budd Co.,* 15 CIT at 452, 773 F. Supp. at 1555; *Independent Radionic Workers v. United States,* 862 F. Supp. 422, 434 (Ct. Int'l Trade 1994). Accordingly, the court will not consider plaintiffs' substantive challenge on this point and Commerce's exclusion from FMV of second-quality merchandise sales and sales subject to German VAT, is sustained.

II. Corporate Consolidation Issues:

Antidumping questionnaires issued to Aramide in the underlying administrative proceeding requested data concerning, *inter alia,* the hierarchical and organizational structure of Aramide and its related companies, including any percentages of ownership held by Aramide or other related party. To supplement its questionnaire responses, Aramide submitted comments notifying Commerce of a planned change of the equity interests in Aramide. Aramide is a joint venture between Akzo Fibers Aramide B.V., a wholly-owned subsidiary of Akzo N.V. (collectively "Akzo N.V."), and the Dutch government, each with a 50% ownership interest. Aramide informed Commerce that (1) Akzo N.V. planned to increase its 50% equity interest in Aramide to 95%, pending approval of the Dutch government, (2) this restructuring would result in the consolidation of Aramide's balance sheet into Akzo N.V.'s balance sheet for the 1993 fiscal year, and (3) both the balance sheets and profit and loss statements of Aramide and Akzo N.V. would be consolidated for the 1993 fiscal year. *See* Pls.' Conf. App. to Mot. J. Upon Agency R., Tab C.R. 38, at 1–3. As a result, Aramide submitted certain consolidated data to Commerce, such as cost and interest expense information. The new restructuring agreement was signed in 1994 with consolidation of Aramide's balance sheet with Akzo N.V. effective December 31, 1993. *Final Det.* at 23,688.

In the final determination, Commerce rejected Aramide's submission of consolidated data for COP and constructed value calculations, on the basis that the corporate restructuring occurred subsequent to the period of investigation. *Id.* Under U.S. and Dutch generally accepted accounting principles, "consolidation is required when one company holds more than a 50 percent equity interest in another company." *Id.* As Akzo N.V. and the Dutch government had equal control over Aramide until the consolidation agreement was signed in 1994, Commerce determined that consolidated treatment was not warranted for the period of investigation. *Id.* The court finds no error in Commerce's conclusion.

A. *Aramide's submission of Akzo N.V.'s 1993 Annual Report:*

In an attempt to "corroborate" its submitted data on the planned consolidation of Aramide and Akzo N.V., Aramide submitted Akzo N.V.'s

[4] The "purely legal" exception is a weak one in any case. Commerce should consider even purely legal arguments in the first instance. *See Holmes Prods. Corp. v. United States,* 16 CIT 1101, 1103 (1992) (finding plaintiff's legal argument waived for failure to raise it before agency). Absent other factors indicating an exception should be made, the "purely legal" argument should fail.

1993 Annual Report ("Annual Report") in its March 28, 1994 Pre-Hearing Brief presented in the underlying administrative proceeding. According to Aramide, the relevant excerpts cited from the Annual Report only corroborated Aramide's comments of the planned corporate restructuring. The Annual Report also contained, however, an independently-audited balance sheet, into which Aramide's balance sheet was consolidated. Pursuant to 19 C.F.R. § 353.31(a)(1)(i) (1994),[5] Commerce rejected Aramide's submission of this information as untimely and as "unsolicited new factual information."

Aramide admits the data was submitted untimely, but relying upon *Böwe-Passat v. United States,* Slip Op. 93–68, at 11 (May 7, 1993), alleges that the data did not "substitute or modify figures previously timely submitted for Commerce's calculations." Aramide's claim is without merit. Although Aramide informed Commerce of the planned restructuring, the agreement was not finalized until 1994. Thus, Aramide's attempt to provide Commerce with definitive data of the effects of the restructuring plan, constitutes new information that likely would require further verification. As indicated, Commerce properly determined that Aramide's financial statements would not be considered on a consolidated basis, and although it also properly rejected the new data, the new data, if accepted, should not have altered the outcome.

B. *Commerce's imputation of Aramide's interest expense for CV purposes:*

During the period of investigation, Commerce found that Aramide received a substantial amount of below-market rate loans from its parent company, Akzo N.V. Pursuant to 19 U.S.C. § 1677b(e)(2),[6] Commerce imputed an interest expense to the loans on the basis of best information available ("BIA"). *Final Det.* at 23,689.

Aramide does not specifically challenge the BIA used by Commerce to impute interest expenses. Rather, Aramide asserts that on a consolidated basis with Akzo N.V. for the 1993 fiscal year, no interest expenses were incurred because the loans were converted into equity. As Commerce properly rejected Aramide's view of itself as a consolidated corporation, as applying to the period of investigation, Aramide's argument is without merit. The court sustains Commerce's imputation of Aramide's interest expenses for the below-market rate loans from Akzo N.V.

C. *Inclusion of prior period expense in COP and CV:*

In the final determination, Commerce included certain expenses, incurred and fully paid for by Akzo N.V. prior to the period of investiga-

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[5] Under 19 C.F.R. § 353.31(a)(1)(i), "submissions of factual information for [Commerce's] consideration shall be submitted not later than * * * [f]or [Commerce's] final determination, seven days before the scheduled date on which the verification is to commence." *Id.* Verification was commenced on February 21, 1994. Thus, the last day for submission of new information was February 14, 1994.

[6] That provision, in pertinent part, provides:

> [A] transaction directly or indirectly between [related parties] * * * may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded * * *, then the determination of the amount required to be considered shall be based on the best evidence available as * * * if the transaction had occurred between [unrelated parties].

19 U.S.C. § 1677b(e)(2) (current version at 19 U.S.C.A. § 1677b(f)(2) (West Supp. 1995)).

tion, in Aramide's general and administrative expenses ("G&A") calculation for COP and constructed value purposes. The prior period expenses were apparently incurred by Akzo N.V. on behalf of Aramide. *See* Pls.' Conf. App. to Mot. J. Upon Agency R., Tab C.R. 70, at 3. Aramide amortized a certain percentage of this expense "as a separate line item in its 1993 six-month financial statements, and as part of selling expenses in its 1992 audited annual financial statements." *Id.* This was consistent with Aramide's practice of allocating a certain percentage of the prior period expense in its financial statements. *See id.*, Tab C.R. 15, at 28. Thus, Commerce determined that "this expense relates to the general production activity of [Aramide] * * * and represents an actual cost recorded on [Aramide's] books during the [period of investigation.]" *Final Det.* at 23,689.

Aramide asserts the prior period expense is actually an "intracompany transaction" that does not reflect the cost incurred during the period of investigation. The court disagrees. The allocation of the prior period expense was pursuant to an agreement entered into between Akzo N.V. and Aramide's parent company. *See* Pls.' Conf. App. to Mot. J. Upon Agency R., Tab C.R. 15, at 28. Thus, the companies chose to assess this expense to Aramide in an allocation scheme that represented an actual charge upon Aramide's financial operations. Therefore, the court finds no error with Commerce's conclusion in this regard. Further, Aramide's argument that the consolidation of Akzo N.V. and Aramide converted this prior period expense into equity, and consequently eliminated the expense, is without merit. *See* discussion of imputed interest expenses, *supra*, at 12–13. Accordingly, the court sustains Commerce inclusion of this prior period expense in Aramide's G&A calculation for purposes of COP and constructed value.

III. Inclusion of Certain G&A Expenses in Aramide's U.S. Indirect Selling Expenses:

Commerce based Aramide's United States price ("USP") upon exporter's sales price[7] ("ESP"), thus ESP was reduced by

> expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise.

19 U.S.C. § 1677a(e)(2) (1988) (current version at 19 U.S.C.A. § 1677a(d) (West Supp. 1995)). For purposes of calculating indirect selling expenses, Commerce generally will include G&A expenses incurred by the United States selling arm of a foreign producer. *See Brass Sheet and Strip from the Federal Republic of Germany,* 52 Fed. Reg. 822, 824 (Dep't Comm. 1987) (final determ.). In this case, Commerce determined that it was appropriate to include in Aramide's indirect selling expenses, certain G&A expenses incurred by Akzo America, Inc. ("Akzo America") on behalf of Aramide's U.S. selling arm, Akzo Fibers, Inc. ("Akzo Fibers").

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[7] ESP is defined as "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter." 19 U.S.C. § 1677a(c) (1988) (current version at 19 U.S.C.A. § 1677a(b) (West Supp. 1995)).

Akzo America is a parent company providing administrative, accounting and finance services to all of Aramide's North American subsidiaries. *Final Det.* at 23,687.

In its questionnaire response, Aramide indicated that Akzo Fibers recorded certain "intercompany charges" from its parent, Akzo America. In making its indirect expense allocation, however, Aramide included only those "intercompany charges" that were "properly classifiable as selling expenses *(i.e.,* product liability premiums and corporate advertising)." Pls.' Conf. App. to Mot. J. Upon Agency R., Tab C.R. 28, at 68. Aramide reasoned that the remaining intercompany charges, or "non-MIAC" charges, did not constitute direct or indirect selling expenses as they were "of a corporate-wide administrative nature *(e.g.,* legal, audit [support,] and personnel)." *Id.* Consequently, Aramide reclassified these charges as "intercompany transfers." *Id.* Nonetheless, in the final determination, Commerce disagreed that the "non-MIAC" charges were "not associated with the selling function of Akzo Fibers." *See Final Det.* at 23,687. Thus, Commerce included a proportionate share of these expenses in the calculation of Aramide's U.S. indirect selling expenses.

Aramide contends that Commerce erred in its calculation, as the "non-MIAC" charges were not attributable to sales of the subject merchandise. In general, Commerce defines indirect selling expenses as "those [selling expenses] which cannot be tied to particular sales, such as salaries paid to sales personnel and inventory carrying costs." *See* Int'l Trade Admin., U.S. Dep't of Comm., *Antidumping Manual: Import Administration* ch. 7, at 11 (July 1993) (hereinafter *"Antidumping Manual").* Here, Akzo Fibers received various corporate-level administrative support services that at a minimum, according to Commerce, were indirectly related to Akzo Fibers' selling functions. *Final Det.* at 23,687. Further, Commerce did not find any evidence indicating that Akzo America provided services to Akzo N.V., its parent company in the Netherlands, "other than to facilitate the activities of the subsidiaries in the United States. *Id.* The court finds Commerce's conclusion supported by substantial evidence.

IV. Correction of Ministerial Error:

After issuance of the final determination, and on the last day for comment, petitioner notified Commerce on May 10, 1994, of certain ministerial errors contained in the margin calculations for Aramide, and requested a two-day extension for completion of its ministerial error analysis.[8] On May 11, 1994, Aramide objected to petitioner's request, arguing that petitioner failed to show adequate cause for the extension.

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[8] Pursuant to 19 C.F.R. 353.28(b) (1994), comments for correction of ministerial errors,

> must be filed within five business days after the date of disclosure unless [Commerce] extends the time limit based upon a written request for extension that is filed within five business days after the date of disclosure and showing cause for such extension.

Id. Petitioner's letter indicated that a two-day extension of time was necessary to ascertain the ministerial error because of the lack of a complete printout of Commerce's margin analysis, and the fact that Commerce's primary analyst was not available during the comment period. Def.-Int.'s Mem. in Opp'n to Pls.' Mot. J. Upon Agency R., App., Tab P.R. 165, at 2.

On that same date, petitioner submitted its comments regarding ministerial error in the final determination. Commerce denied petitioner's request for an extension for failure to show adequate cause on June 15, 1994, and rejected petitioner's submissions as untimely.

On June 17, 1994, petitioner again requested that Commerce reconsider the denial of petitioner's request for an extension of time to file comments, and reconsider the refusal to correct ministerial errors in the final determination. Aramide again opposed petitioner's letter. Nonetheless, on June 21, 1994, Commerce notified Aramide that correction of a ministerial error regarding currency conversions in the constructed value calculation would be made, despite the untimeliness of petitioner's comments. Pls.' Pub. App. to Mot. J. Upon Agency R., Tab P.R. 175, at 1. Correction of this error increased the final margin calculation for Aramide. *See Amended Final Det.* at 32,678.

Under the statute, Commerce may correct "ministerial errors" resulting from

> errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.

19 U.S.C. § 1673d(e) (1988); *see* 19 C.F.R. § 353.28(d) (1994). In this case, Commerce failed to convert Aramide's direct selling expenses from German marks and Japanese yen into Dutch guilders before deduction from the Dutch-guilder denominated constructed value calculation. This is clearly a clerical or ministerial error, not one resulting from a judgment call.

Aramide contends that Commerce failed to follow its regulations by considering petitioner's untimely submissions for purposes of making the correction. Aramide further points out that the error existed at the time of issuance of the preliminary determination on December 9, 1993, and petitioner did not exhaust administrative remedies on this point. Thus, according to Aramide, no clerical error should have been corrected by Commerce and an antidumping duty order should have been issued with the margin contained in the final determination. The court disagrees.

The court does not find that Commerce failed to follow its regulations. As indicated, Commerce denied petitioner's request for extension of time to file comments on the basis that petitioner failed to show adequate cause.[9] The result was Commerce's removal of petitioner's untimely submissions from the record. Pls.' Pub. App. to Mot. J. Upon Agency R., Tab P.R. 171, at 1. Although petitioner submitted another objection to Commerce's denial, there is no indication in the record that Commerce permitted petitioner to resubmit its comments.

Commerce also did not err in amending the determination pursuant to its *sua sponte* authority. First, Aramide's speculation that Commerce

[9] The court does not address whether it was an abuse of discretion to deny the extension. Given the circumstances, however, it probably would have been appropriate to grant the extension.

succumbed to correction of the ministerial error because of political pressure by petitioner is only speculation. No evidence supports this theory. Second, any requirement of exhaustion of administrative remedies does not apply to the administrator. Third, the court has long recognized that "fair and accurate determinations are fundamental to the proper administration of our dumping laws." *See, e.g., Koyo Seiko Co. v. United States,* 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). As a result, except in unusual situations not present here, the court has "uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Id.; see Federal-Mogul Corp. v. United States,* 872 F. Supp. 1011, 1014 (Ct. Int'l Trade 1994) (listing cases). *But see Hyster Co. v. United States,* 858 F. Supp. 202, 206 (Ct. Int'l Trade 1994) (refusing to permit correction of errors, as plaintiffs' allegations presented new bases of error and were untimely in "already lengthy proceeding"). The court finds that Commerce may, with or without a party's request, correct errors that it reasonably regards as ministerial in final determinations. *See CEMEX, S.A. v. United States,* Slip Op. 95–72, at 15 (Apr. 24, 1995); *see also Bookman v. United States,* 453 F.2d 1263, 1265–66 (Ct. Cl. 1972) (noting that as general rule, agency has some power to correct its own errors, so long as that decision is not arbitrary, capricious or unsupported by substantial evidence). As indicated, these errors were well within the category of clerical or ministerial error. Thus, Commerce's correction of currency conversions in Aramide's constructed value calculation is sustained.

CONCLUSION

Finding no error of law and finding Commerce's determination supported by substantial evidence in all respects, the court sustains the determination.

(Slip Op. 95–148)

THE HUMANE SOCIETY OF THE UNITED STATES, HUMANE SOCIETY INTERNATIONAL, DEFENDERS OF WILDLIFE, ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, WHALE AND DOLPHIN CONSERVATION SOCIETY, AND EARTH ISLAND INSTITUTE, PLAINTIFFS *v.* RON BROWN, SECRETARY OF COMMERCE, AND WARREN CHRISTOPHER, SECRETARY OF STATE, DEFENDANTS

Court No. 95–05–00631

[Defendants' motion to dismiss granted in part and denied in part; plaintiffs' application for preliminary injunction denied; defendants' motion for protective order denied.]

(Dated August 18, 1995)

Sierra Club Legal Defense Fund (Patti A. Goldman) for the plaintiffs.

Frank W. Hunger, Assistant Attorney General; *Lois J. Schiffer,* Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division *(Jeffrey M. Telep)* and Environment & Natural Resources Division *(James C. Kilbourne, Christiana P. Perry* and *Mark A. Brown),* U.S. Department of Justice; and Office of the Legal Advisor, U.S. Department of State *(David Balton)* and Office of General Counsel, National Oceanic and Atmospheric Administration *(Margaret F. Hayes),* of counsel, for the defendants.

OPINION AND ORDER

AQUILINO, *Judge:* Alleging continuing large-scale driftnet fishing in the Mediterranean Sea by fishermen from Italy in defiance of international, European and American law, the above-named plaintiffs come to this Court of International Trade with a complaint styled as one for declaratory and injunctive relief and accompanied by voluminous papers entitled Motion for a Preliminary Injunction. The defendants oppose that application for immediate relief and have interposed motions of their own, the first to dismiss the complaint and the others for relief from discovery already requested by the plaintiffs.

A hearing was held in open court on August 1, 1995 on the respective motions.

I

For the purposes of a motion to dismiss, the material allegations of a complaint are taken as admitted and are to be liberally construed in favor of the plaintiff(s). *E.g., Jenkins v. McKeithen,* 395 U.S. 411, 421–22, *reh'g denied,* 396 U.S. 869 (1969), and cases cited therein.

A

With this rule in mind, the complaint herein alleges, among other things, that plaintiff The Humane Society of the United States ("HSUS") is a national membership organization with its principal office in Washington, D.C. and regional offices throughout the country. It

> promotes the protection of animals, including marine species and cetaceans, in particular. For more than 23 years, HSUS has actively

> worked to protect cetaceans, including by seeking to stop destructive fishing practices like large-scale driftnetting, which pose a grave threat to marine mammals, sea turtles, sea birds, and nontarget fish species. HSUS brings this action on its own behalf and on behalf of its more than 2 million members and supporters, more than 300 of whom reside in the European Union. HSUS members engage in and obtain great benefit from watching wildlife, including whales and dolphins and other marine life. HSUS members are harmed by large-scale driftnet fishing because it kills marine mammals, sea turtles, and sea birds and thereby reduces HSUS members' opportunity to view wildlife, particularly depleted and elusive species, such as the sperm whale.

Complaint para. 4. The complaint is possessed of similar representations as to the other named plaintiffs: For example, Humane Society International and its affiliate in Europe "are working to protect cetaceans and other marine life from destructive fishing practices like large-scale driftnetting." *Id.*, para. 5. There are 100,000 Defenders of Wildlife members throughout the United States and the world who "are harmed by large-scale driftnet fishing because it kills marine mammals, sea turtles, and sea birds and thereby reduces * * * [their] opportunity to view wildlife." *Id.*, para. 6. The Royal Society for the Prevention of Cruelty to Animals was established in 1824 in the United Kingdom to "prevent or suppress cruelty to animals." Its

> 22,000 members and 600,000 supporters throughout the European Union (including Italy) and the rest of the world * * * enjoy watching marine wildlife including in and around the Mediterranean Sea and throughout the world. RSPCA members are harmed by the diminishing numbers of marine wildlife in and around the Mediterranean Sea as a result of large-scale driftnet fishing in the area because it reduces their opportunity to view such wildlife.

Id., para. 7. Supporters of the Whale and Dolphin Conservation Society, which is also headquartered in England, "are harmed by the diminishing numbers of dolphins and whales in and around the Mediterranean Sea as a result of large-scale driftnet fishing in the area." *Id.*, para. 8. A similar claim is made on behalf of Earth Island Institute and some 30,000 members. *See id.*, para. 9.

The defendants are being sued in their official capacities as U.S. Secretary of Commerce and Secretary of State, respectively. Each is averred to have responsibilities under the High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102–582, 106 Stat. 4900 (Nov. 2, 1992).

B

That statute describes "large-scale driftnet fishing", in general, as

> a method of fishing in which a gillnet composed of a panel or panels of webbing, or a series of such gillnets, with a total length of two and one-half kilometers or more is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing.

16 U.S.C. § 1826c(2)(A). Paragraphs 12–15 and 17 of the complaint add that the panels consist of

> non-degradable plastic webbing. Driftnets are sometimes as long as 30 kilometers. Driftnet fishing involves the suspension of driftnets vertically in the water with floats attached to the top of the panel and weights attached to the bottom.
>
> 13. Driftnets are placed in the water at night and * * * catch virtually all fish, marine mammals, and sea turtles that cross their paths as they drift in the wind and ocean currents.
>
> 14. Driftnets are a nonselective type of fishing gear. A high percentage of the fish caught are not the target of the particular driftnet fishery. These non-target fish species are generally discarded at sea, even where the fish are the target of other fisheries. In some fisheries, only a small proportion of the catch is retained for sale.
>
> 15. Because the nets are composed primarily of non-degradable plastic, lost or discarded nets or net fragments continue to "ghostfish," ensnaring fish and marine mammals as they drift aimlessly in the ocean.
>
> * * * * * * *
>
> 17. Whales, dolphins, sharks, sea turtles, sea birds, and nontarget fish become entangled in large-scale driftnets both when they are deployed and in use for fishing and when they are lost, abandoned or discarded. Such entanglements cause countless deaths of marine mammals, sea turtles, sea birds, and fish. Slow-reproducing species, such as whales and dolphins, are particularly vulnerable to the effects of driftnet fishing.

Similar description is contained in the report to Congress in support of adoption of the Enforcement Act. *See, e.g.,* H.R.Rep. 262, Part 1, 102d Cong., 2d Sess. 4 (Oct. 22, 1992) ("large-scale driftnets are distinguished by their method of harvest, indiscriminately killing not only non-targeted fish, but dolphins, whales, turtles and seabirds").

The plaintiffs accuse Italians of continuing to engage in such carnage. Their complaint states:

> 40. The Mediterranean Sea is an enclosed sea. It has no exclusive economic zones, but some areas of varying sizes have been designated as territorial seas. A significant portion of the Mediterranean Sea is considered international waters or the high seas.
>
> 41. Italy has a large Mediterranean fleet of more than 600 vessels and 3000 workers fishing for swordfish with driftnets.
>
> 42. Throughout the 1990s, reports have documented that the average length of driftnets used by the Italian fleet in the Mediterranean Sea exceeds 2.5 kilometers.
>
> 43. The European Commission has reported in 1993 and 1994 that significant numbers of Italian fishing vessels are using driftnets in excess of 2.5 kilometers in length.
>
> 44. During the 1990s and as late as 1994, some Italian fishing vessels intercepted by authorities of other European countries have been found with driftnets longer than 2.5 kilometers.
>
> 45. Although swordfish are the target of the Italian driftnet fishery, far less than half of the catch is, in fact, swordfish * * *.

C

The complaint points to resolutions of the United Nations General Assembly adopted on December 22, 1989, No. 44–225, recommending that countries impose a moratorium by June 30, 1992 on the use of large-scale driftnets beyond the exclusive economic zone of any nation, and on December 20, 1991, No. 46–215, calling for the moratorium to be globally implemented by December 31, 1992, including enclosed and semi-enclosed seas. The plaintiffs also point to a January 27, 1992 regulation of the European Economic Community, No. 345/92, which was adopted to implement the U.N. moratorium and which prohibits vessels from keeping on board or using driftnets exceeding 2.5 kilometers in length.

Prior to adoption of this law by the United Nations and on the part of the European Economic Community, which is now known as the European Union, the U.S. Congress had passed the Driftnet Impact Monitoring, Assessment, and Control Act of 1987, Pub.L. No. 100–220, Title IV, 101 Stat. 1477 (Dec. 29, 1987), which, among other things, sought to "reduce the adverse impacts of driftnets" in the "waters of the North Pacific Ocean, including the Bering Sea"[1] and mandated that the Secretary of Commerce immediately initiate, through the Secretary of State and in consultation with the cabinet Secretary responsible for the U.S. Coast Guard, negotiations with each foreign government which conducted, or authorized its nationals to conduct, driftnet fishing in those waters. *See* Pub.L. No. 100–220, § 4006, 101 Stat. at 1479. That statute was expanded by the Driftnet Act Amendments of 1990, Pub.L. No. 101–627, § 107, 104 Stat. 4441 (Nov. 28, 1990), to report findings of Congress, including that

> the continued widespread use of large-scale driftnets beyond the exclusive economic zone of any nation is a destructive fishing practice that poses a threat to living marine resources of the world's oceans, including but not limited to the North and South Pacific Ocean and the Bering Sea[.]

16 U.S.C. § 1826(b)(1). The policy of the Congress was declared to be

> (1) implement the moratorium called for by the United Nations General Assembly in Resolution Numbered 44–225;
>
> (2) support the Tarawa Declaration and the Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific; and
>
> (3) secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation.

16 U.S.C. § 1826(c). Whereupon the members of the President's cabinet covered by the 1987 enactment were directed to (d) "seek to secure international agreements to implement immediately the findings [and] policy, * * * in particular an international ban on large-scale driftnet

[1] Pub.L. No. 100–220, § 4002, 101 Stat. at 1477.

fishing", based upon ten enumerated considerations and (e) to report to Congress every year, starting not later than January 1, 1991, the results of such attempts. *See* 16 U.S.C. § 1826(d) and (e).

Thereafter, the High Seas Driftnet Fisheries Enforcement Act came into existence, reporting ten renewed findings on the part of Congress, including:

> (4) The United Nations, via General Assembly Resolutions numbered 44–225, 45–197, and most recently 46–215 * * *, has called for a worldwide moratorium on all high seas driftnet fishing by December 31, 1992, in all the world's oceans, including enclosed seas and semi-enclosed seas.
>
> (5) The United Nations has commended the unilateral, regional, and international efforts undertaken by members of the international community and international organizations to implement and support the objectives of the General Assembly resolutions.
>
> (6) Operative paragraph (4) of United Nations General Assembly Resolution numbered 46–215 specifically "encourages all members of the international community to take measures individually and collectively to prevent large-scale pelagic driftnet fishing operations on the high seas of the world's oceans and seas".

106 Stat. at 4900. The policy of the United States is stated to be (1) implementation of UNGA Resolution 46–215,

> (2) bring about a moratorium on fishing in the Central Bering Sea, or an international conservation and management agreement to which the United States and the Russian Federation are parties that regulates fishing in the Central Bering Sea; and
>
> (3) secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation.

106 Stat. at 4901. Section 101 of the act, which is codified as 16 U.S.C. § 1826a, provides:

> **(a) Denial of port privileges**
>
> **(1) Publication of list**
>
> Not later than 30 days after November 2, 1992, and periodically thereafter, the Secretary of Commerce, in consultation with the Secretary of State, shall publish a list of nations whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation.
>
> **(2) Denial of port privileges**
>
> The Secretary of the Treasury shall, in accordance with recognized principles of international law—
>
> **(A)** withhold or revoke the clearance required by section 91 of the Appendix to Title 46 for any large-scale driftnet fishing vessel that is documented under the laws of the United States or of a nation included on a list published under paragraph (1); and
>
> **(B)** deny entry of that vessel to any place in the United States and to the navigable waters of the United States.

(3) Notification of nation

Before the publication of a list of nations under paragraph (1), the Secretary of State shall notify each nation included on that list regarding—

(A) the effect of that publication on port privileges of vessels of that nation under paragraph (1); and

(B) any sanctions or requirements, under this Act or any other law, that may be imposed on that nation if nationals or vessels of that nation continue to conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation after December 31, 1992.

(b) Sanctions

(1) Identifications

(A) Initial identifications

Not later than January 10, 1993, the Secretary of Commerce shall—

(i) identify each nation whose nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation; and

(ii) notify the President and that nation of the identification under clause (i).

(B) Additional identifications

At any time after January 10, 1993, whenever the Secretary of Commerce has reason to believe that the nationals or vessels of any nation are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation, the Secretary of Commerce shall—

(i) identify that nation; and

(ii) notify the President and that nation of the identification under clause (i).

(2) Consultations

Not later than 30 days after a nation is identified under paragraph (1)(B), the President shall enter into consultations with the government of that nation for the purpose of obtaining an agreement that will effect the immediate termination of large-scale driftnet fishing by the nationals or vessels of that nation beyond the exclusive economic zone of any nation.

(3) Prohibition on imports of fish and fish products and sport fishing equipment

(A) Prohibition

The President —

(i) upon receipt of notification of the identification of a nation under paragraph (1)(A); or

(ii) if the consultations with the government of a nation under paragraph (2) are not satisfactorily concluded within ninety days, shall direct the Secretary of the Treasury to prohibit the importation into the United States of fish and fish products and sport fishing equipment (as that term is defined in section 4162 of Title 26) from that nation.

(B) Implementation of prohibition

With respect to an import prohibition directed under subparagraph (A), the Secretary of the Treasury shall implement such prohibition not later than the date that is forty-five days after the date on which the Secretary has received the direction from the President.

(C) Public notice of prohibition

Before the effective date of any import prohibition under this paragraph, the Secretary of the Treasury shall provide public notice of the impending prohibition.

(4) Additional economic sanctions

(A) Determination of effectiveness of sanctions

Not later than six months after the date the Secretary of Commerce identifies a nation under paragraph (1), the Secretary shall determine whether—

(i) any prohibition established under paragraph (3) is insufficient to cause that nation to terminate large-scale driftnet fishing conducted by its nationals and vessels beyond the exclusive economic zone of any nation; or

(ii) that nation has retaliated against the United States as a result of that prohibition.

(B) Certification

The Secretary of Commerce shall certify to the President each affirmative determination under subparagraph (A) with respect to a nation.

(C) Effect of certification

Certification by the Secretary of Commerce under subparagraph (B) is deemed to be a certification under * * * [22 U.S.C. § 1978(a)], as amended by this Act.

As just shown, among other statutes, this Enforcement Act amended Title 22, U.S.C., governing Foreign Relations and Intercourse, in particular, the so-called Pelly Amendment to the Fishermen's Protective Act of 1967, expanding its purview from "fish products" to "any products from the offending country". *Compare* 22 U.S.C. § 1978 (1988) *with* Pub.L. No. 102–582, § 201, 106 Stat. at 4904 *and* H.R. Rep. 262, Part 1, 102d Cong., 2d Sess. 11 (Oct. 22, 1992).

D

This is the regime of law which the plaintiffs allege the defendants have disregarded upon a representation that

> [i]nformation about Italian violations in the Mediterranean Sea of the U.N. moratorium and the High-Seas Driftnet Fisheries Enforcement Act has been provided to both the State Department and the Commerce Department. Plaintiffs and other environmental organizations have provided such information to defendants' representatives and have urged defendants to certify Italy under the * * * Enforcement Act.

Complaint para. 47. Their first pleaded cause of action alleges a violation by defendant Brown of section 1826a(b)(1)(A), *supra.* The second

count avers that, by failing to identify Italy as a country whose nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation, as required by section 1826a(b)(1)(B), *supra*, the Secretary of Commerce has acted arbitrarily, capriciously and not in accordance with law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Among other relief, the plaintiffs pray for declarations adjudging defendant Brown in violation of both subsections of 16 U.S.C. § 1826a(b)(1) and for writs of mandamus, directing him to implicate Italy thereunder.

The court's jurisdiction is alleged to be under 28 U.S.C. § 1581(i)(3) and (4) and 28 U.S.C. § 1331.

II

As indicated above, the defendants have interposed a motion "[p]ursuant to Rule 12(b)(1) of the Rules of this Court * * * to dismiss plaintiffs' action for lack of standing." At the hearing thereon, counsel adhered to that choice of subsection of Rule 12(b)[2], which authorizes assertion of the defense of lack of jurisdiction over the subject matter by way of motion, as opposed to subsection (5) of that rule, which permits similar presentation of the defense of failure to state a claim upon which relief can be granted.[3]

Courts have treated the issue of standing as subsumed within that latter defense. *See, e.g., Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed.Cir. 1991); *Physicians' Education Network, Inc. v. Dep't of Health, Education & Welfare*, 653 F.2d 621 (D.C.Cir. 1981); *Benjamin v. The Aroostook Medical Center, Inc.*, 57 F.3d 101 (1st Cir. 1995); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir. 1995); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994); *Bauer v. Sweeney*, 964 F.2d 305 (4th Cir. 1992); *Whalen v. Carter*, 954 F.2d 1087 (5th Cir. 1992), *McCready v. Michigan State Bar*, 881 F.Supp. 300 (W.D.Mich. 1995); *Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993); *Burton v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208 (8th Cir.), *cert. denied*, 115 S.Ct. 366 (1994); *Barrus v. Sylvania*, 55 F.3d 468 (9th Cir. 1995); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542 (10th Cir. 1995); *Capeletti Brothers, Inc. v. Broward County*, 738 F.Supp. 1415 (S.D.Fla. 1990), *aff'd*, 931 F.2d 903 (11th Cir.), *cert. denied*, 501 U.S. 1238 (1991); *Mitsuboshi Belting Limited v. United States*, 17 CIT ____, Slip Op. 93–205 (Oct. 22, 1993). While courts have also considered standing to be within the ambit of subject-matter

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[2] *See* transcript of hearing ("Tr."), pp. 94–95. Counsel have also adhered to their right under CIT Rule 7(d) to file a reply in support of their dispositive motion, which was received August 11, 1995. However, in addition to continuing to contend that the plaintiffs fail to satisfy the elements required for standing before this court, the defendants now argue, among other things, that this action is not reviewable under the Administrative Procedure Act because there has been no final agency determination, which the Driftnet Enforcement Act leaves entirely within the discretion of the Secretary of Commerce.

This proliferation of grounds upon which the defendants seek dismissal has brought forth a motion from the plaintiffs to file a surreply, which is hereby granted.

The new grounds are discussed in point IV hereinafter.

[3] That defense is numbered subsection (6) of Rule 12(b) of the Federal Rules of Civil Procedure.

jurisdiction[4], in essence each is a separate concern. *See, e.g., Baker v. Carr,* 369 U.S. 186, 198–208 (1962). The focus of the defense of lack of subject-matter jurisdiction is on the authority of the court chosen to hear and decide the claims presented, while lack of standing focuses on the parties making that choice of forum and those claims. *See generally Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982); *Warth v. Seldin,* 422 U.S. 490 (1975).

A

Whatever their desired avenue, the court concurs with the defendants that "it is unnecessary to look to facts adduced outside the pleadings"[5] to render a decision thereon. To the extent they continue to adhere to CIT Rule 12(b)(1), the Customs Courts Act of 1980 confers exclusive jurisdiction upon this Court of International Trade over

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for * * *
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraph * * * (3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i). And subsequent judicial interpretation has affirmed the exclusivity of this jurisdiction over an action like the one at bar. *E.g., Earth Island Institute v. Christopher,* 6 F.3d 648, 652 (9th Cir. 1993) ("prohibitions on shrimp importation for environmental protection * * * clearly fall within the range of CIT jurisdiction identified by the Supreme Court in *K Mart" Corp. v. Cartier, Inc.,* 485 U.S. 176 (1988)). Moreover, the 1980 act provides that this court may order, among other forms of relief herein, a declaratory judgment, remand, or a writ of mandamus or prohibition. 28 U.S.C. § 2642(c)(1).

B

As shown above, the Driftnet Enforcement Act required the Secretary of Commerce initially to identify each nation whose nationals or vessels were conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation and to notify the President and those nation(s) of that identification "[n]ot later than January 10, 1993". 16 U.S.C. § 1826a(b)(1)(A). The plaintiffs complain of defendant Brown's failure to identify Italy in this regard and pray for relief therefrom per Count One of their complaint, which was served and filed in May 1995. In view of its timing, however, this pleaded cause of action fails to state a claim

[4] *See, e.g., Thompson v. County of Franklin,* 15 F.3d 245, 247–48 (2d Cir. 1994).

[5] Defendants' Reply Memorandum, p. 1. The defendants press this point out of apparent concern that the court, in the exercise of its discretion, might consider the voluminous declarations filed beforehand in support of plaintiffs' applications for immediate relief.

The court has not and will not on the issue(s) the defendants now raise.

upon which relief can be granted within the meaning of CIT Rule 12(b)(5), if not also subsection (1) thereof[6]. That is, the statute of limitation controlling this action, brought as it is pursuant to 28 U.S.C. § 1581(i), requires that it have been commenced within two years after the causes pleaded herein first accrued.[7] Ergo, defendants' motion to dismiss must be granted as to the first count of plaintiffs' complaint, albeit not on the ground of lack of standing.

The court cannot, and therefore, does not reach the same conclusion at this stage with regard to plaintiffs' second cause of action, which is based on subsection (b)(1)(B) ("Additional identifications") of the Enforcement Act, 16 U.S.C. § 1826a, *supra*. That provision applies "any time after January 10, 1993, whenever the Secretary of Commerce has reason to believe" unacceptable driftnetting is taking place. Clearly, plaintiffs' complaint thereon is not now untimely.

C

As for their ability to proceed now on that count, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which was an action brought under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, by "organizations dedicated to wildlife conservation and other environmental causes"[8], the Supreme Court reiterated that, at

> the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."

504 U.S. at 561, quoting from *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990). Here, this court is unable to find that plaintiffs' allegations of injury, at first blush and as referred to in point I hereinabove, are materially different from those considered to be sufficient "injury in fact" in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 231 n. 4 (1986), "in that the whale watching and studying of the [ ] members [of the plaintiffs HSUS, Defenders of Wildlife, *et al.* therein] will be adversely affected by continued whale harvesting, and this type of injury is within the 'zone of interests' protected by the Pelly and Packwood Amendments." That case, like the one at bar, was brought pursuant to the Administrative Procedure Act, and the Court found nothing in those amendments indicating congressional intent to foreclose judicial review. The same is true of the Driftnet Enforcement

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[6] *Cf. Former Employee of Eastman Christensen v. U.S. Secretary of Labor*, 15 CIT 496 (1991).

[7] 28 U.S.C. § 2636(i). Once the defendants had referred to this statute in their papers in opposition to plaintiffs application for immediate relief, the plaintiffs abandoned that part of their application based on Count One, if not completely, then at least at this stage of the proceedings. *Compare* Reply Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, p. 3 *with* Tr. at 5–6. They also argue in that brief, page 4, note 1 that they are

> troubled by defendants' claim that Count I is barred by a two-year statute of limitations applicable to claims brought before this court. Prior to the ruling in *Earth Island Institute v. Brown*, 28 F.3d 76 (9th Cir. 1994), claims like this one were brought in federal district courts and were subject to the six year statute of limitations applicable generally to claims against the government. Requiring such claims to be brought before the Court of International Trade should not diminish plaintiffs' rights.

Of course, this point is better presented to Congress, along with the historical fact that the *Earth Island Institute* decision cited actually relied on the earlier *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993), decision to the same effect. *See* 28 F.3d at 78, *cert. denied*, 115 S.Ct. 509 (1994).

[8] 504 U.S. at 559.

Act, *supra*. As the Court stated in *Sierra Club v. Morton,* 405 U.S. 727, 738 (1972):

> The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.

Nonetheless, as the defendants point out, whatever the nature of the injury pleaded, it must be "fairly traceable to the[ir] allegedly unlawful conduct and likely to be redressed by the requested relief." Defendants' Memorandum in Support of Motion to Dismiss, p. 7, quoting *Allen v. Wright,* 468 U.S. 737, 751 (1984). Perhaps, on final analysis, the plaintiffs will not have satisfied these requirements. For the moment, however, with only the complaint at hand, this court cannot concur with defendants' initial, proffered assessment that the plaintiffs are incapable of establishing any causal connection to, or redress of, the injuries they allege. *Cf. Earth Island Institute v. Christopher,* 19 CIT ____, ____, F.Supp. ____, Slip Op. 95–103 (June 5, 1995).

III

In fact, in their papers in support of the application for immediate relief, the plaintiffs boldly posture that they "are virtually certain to prevail on the merits of their claims."[9] Of course, that relief is extraordinary and can only be granted upon showing:

> (1) A threat of immediate irreparable harm; (2) that the public interest would be better served by issuing than by denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favor[s issuance].

S.J. Stile Associates, Ltd. v. Snyder, 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981); *American Stevedoring Inc. v. U.S. Customs Service,* 18 CIT ____, ____, 852 F.Supp. 1067, 1071 (1994). That is, failure to bear the burden of persuasion as to any one of these four factors is ground for denial of an application. *E.g., Bomont Industries v. United States,* 10 CIT 431, 638 F.Supp. 1334 (1986). *See FMC Corporation v. United States,* 3 F.3d 424, 427 (Fed.Cir. 1993).

Assuming arguendo that plaintiffs' regard for the substantive issues of law they raise is not without foundation, this and other courts have held that although the

> extraordinary remedy of a preliminary injunction is not available unless the moving party's burden of persuasion is met as to all four of the above factors, the showing of likelihood of success on the merits is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief.

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[9] Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, pp. 25, 38, 42.

Daido Corporation v. United States, 16 CIT 987, 997, 807 F.Supp. 1571, 1579–80 (1992), quoting *Smith Corona Corp. v. United States,* 11 CIT 954, 965, 678 F.Supp. 285, 293 (1987), quoting *Hyundai Pipe Co. v. U.S. Department of Commerce,* 11 CIT 238, 243 (1987), and citing *Ceramica Regiomontana, S.A. v. United States,* 7 CIT 390, 395, 590 F.Supp. 1260, 1264 (1984), and *American Air Parcel Forwarding Co. v. United States,* 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981). Here, however, the plaintiffs fail to satisfy even such proportionate standard of analysis.

To be sure, the court has held in preceding point II of this opinion that plaintiffs' complaint, on its face, establishes sufficient harm for this action to proceed, but neither it nor perusal of the declarations of plaintiffs' counsel dated June 15 and July 10, 1995 and of George Berry (May 29), Nicolaos Charalambides (July 2), Patricia Forkan (June 2), Alessandro Gianni' (June 15 and Aug. 3), Katherine Hanly (May 30), Erich Hoyt (May 26), Leesteffy Jenkins (May 26), Gerald Leape (June 1), Helen McLachlan (June 1), David C. Phillips (May 30), William J. Snape, III (May 31), Rebecca A. Staffel (June 15 and July 10), Chris Stroud (May 26) and Andrew Troia (June 26, 1995) and of some 56 numbered exhibits presented along with them leads the court to find that the injuries they claim to suffer would be irreparable in the absence of an immediate writ of mandamus against the defendant(s). Indeed, these voluminous papers are bereft of any contention to the contrary. Plaintiffs' brief can only claim that "illegal Italian driftnet fishing is causing immediate, irreparable harm to marine resources in the Mediterranean Sea."[10] Moreover, even if the plaintiffs themselves were similarly exposed to that severity of injury, instantaneous enforcement here of the law upon which they rely would not provide relief of comparable timing there.[11] Finally, if time is an element of irreparability[12], commencement of this action years after large-scale driftnetting came to be unaccept able has hardly advanced plaintiffs' cause for relief this moment, which presumably is a reason for the offer to merge their application with trial of the action on the merits in accordance with CIT Rule 65(a)(2).

IV

At the hearing, the court expressed readiness to expedite final resolution of this action and thereupon denied a motion filed by the defendants to stay, pending decision of the application for immediate relief, their responding to ten concise, written interrogatories to the Departments of Commerce and State relevant to the claims in this action, a request to each for production of documents identified in response to three of the questions and three relevant requests to admit addressed to defendant Brown and served months ago by the plaintiffs. Upon denial of a stay,

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[10] *Id.* at 26. *See also id.* at 39, 42.

[11] Apparently, the season for swordfish in that body of water runs from approximately May to October each year. *See* Tr. at 37.

[12] *See, e.g., Bomont Industries v. United States,* 10 CIT 431, 437, 638 F.Supp. 1334, 1339 (1986); *Daido Corporation v. United States,* 16 CIT 987, 997, 807 F.Supp. 1571, 1579–80 (1992).

the defendants sought and obtained leave to present a motion for a protective order pursuant to CIT Rules 7 and 26.

On the eve of the hearing, the defendants had filed documents with the court purported to comprise their administrative record, and the gist of the motion for a protective order, which was received on August 9, 1995, is that

> there is no need for the court to look for evidence other than that contained in the administrative record upon which the agency based its decision.[13]

In other words, the

> scope of review in APA cases is limited to the administrative record that was considered, directly or indirectly, by the agency decisionmaker at the time he made his decision.[14]

However, as foregoing footnote 2 indicates, defendants' morerecently filed reply in support of their motion to dismiss takes the position that this action is not reviewable under the Administrative Procedure Act "because there has been no final agency action." Defendants' Reply Memorandum, p. 16. It is also argued that the matter of which the plaintiffs complain is committed exclusively to executive-branch discretion, that the Driftnet Enforcement Act "contains no mechanism authorizing citizen suits seeking judicial review of agency action"[15] and lastly that this action "is also unripe." *Id.* at 17, n. 12.

A

Each of these newly-asserted points is tenuous. The APA defines "agency action" to include "failure to act", 5 U.S.C. § 551(13), and it specifically provides for judicial intervention to "compel agency action unlawfully withheld or unreasonably delayed". 5 U.S.C. § 706(1). There are two exemptions from this grant of authority per 5 U.S.C. § 701(a)(2): Either the statute precludes judicial review, which is not the case here, or agency action is committed to its discretion by law, which is also not true. Stated another way, while the Enforcement Act does not have a citizen-suits provision like that of the Endangered Species Act, 16 U.S.C. § 1540(g)(1), the Supreme Court has noted that judicial review of agency action "is available absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. at 231 n. 4, citing *Block v. Community Nutrition Institute,* 467 U.S. 340, 345 (1984); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). To repeat from point IIC above, no such legislative intent is discernible from the statute at bar, or from the history underlying its enactment. Also, there is no indication in either

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[13] Corrected Memorandum in Support of Defendants' Motion for Protective Order, p. 11.

[14] *Id.* at 8, citing, *inter alia, Florida Power & Light Co. v. Lorion,* 470 U.S. 729 (1985); *Camp v. Pitts,* 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971); *Montgomery Ward & Co. v. Zenith Radio Corp.,* 672 F.2d 1254 (CCPA), *cert. denied sub nom. Zenith Radio Corp. v. United States,* 459 U.S. 943 (1982).

[15] Defendants' Reply Memorandum, p. 13.

its language or congressional history that the defendants are granted unfettered discretion. On the contrary, the court concludes from the plain language that Congress intended identification under 16 U.S.C. § 1826a(b)(1) to be mandatory. The Secretary of Commerce was not at liberty not to notify the President by January 10, 1993 in accordance with subsection 1826a(b)(1)(A) of each nation whose nationals or vessels were conducting large-scale driftnet fishing anywhere in the world beyond its exclusive economic zone, and defendant Brown has no discretion now under the lesser, reason-to-believe standard of subsection (b)(1)(B) not to notify the President of any such unlawful activity. Hence, defendants' attempt to argue that this action is not yet ripe for review is unfounded.

B

That attempt has import, however, in light of counsel's continuing admission of "infirmities in the record"[16]. Indeed, the court has reviewed all of the materials filed by the defend ants to date, save those delivered under seal, and has not discovered anything even arguably "the contested determination and the findings or report upon which such determination was based" or the "reported hearings or conferences conducted by the agency" contemplated by 28 U.S.C. § 2635(d)(1), CIT Rule 72(a) and the Administrative Procedure Act. Not only have such crucial elements failed to materialize, the defendants concede that underlying, relevant matter has been withheld, *e.g.*:

> * * * [D]efendants did not include all tasking instructions issued by the Coast Guard Intelligence Coordination Center to the U.S. Naval fleet in the Mediterranean. These instructions direct the Navy to verify, if possible, reports of Italian driftnet fishing.
>
> Defendants originally included all tasking instructions in the possession of the Department of State, including the first document in the series, issued in May 1994 * * *. Based upon the May 1994 instructions, the Departments of State and Commerce believed, correctly, that the Coast Guard would continue tasking the Naval fleet in the same manner and with the same frequency until contrary instructions were issued. Consequently, the Departments of State and Commerce did not retrieve additional tasking instructions from the Coast Guard or include these additional instructions in the administrative record. Nevertheless, because the agencies relied upon the Coast Guard's representations that tasking instructions would continue until further notice, and because these tasking instructions substantiate their belief, we have obtained the instructions from the Coast Guard and will add them to the administrative record under separate cover.[17]

Also, the letter of transmittal of defendants' documents on the eve of the hearing, as well as the accompanying certification of an officer of the Department of State, report redaction or nonproduction of numerous

[16] *Supra* note 13. *Cf.* Tr. at 64.

[17] Corrected Memorandum in Support of Defendants' Motion for Protective Order, pp. 6–7 (footnotes omitted).

documents. While this withholding of evidence may prove defensible, to date the defendants have not properly established in accordance with the rules of practice "privilege" or "state secrets" or the other grounds asserted, which inadequacy their counsel conceded at the hearing. *See* Tr. at 126.

In regard to the U.S. Coast Guard tasking instructions referred to, the defendants note that the

> principal difference between each tasking instruction was to direct the Mediterranean fleet where to look for alleged driftnet fishing based upon such factors as the most recent allegations of driftnet fishing by nongovernmental organizations, traditional locations of seasonal Italian fishing activities, and other intelligence information.[18]

On their part, the plaintiffs, who profess interaction with, and encouragement of, the defendants to carry out their official responsibilities, and whose own materials confirm this, state unequivocally that "the certified record is missing some key documents that are presumably in the defendants' possession."[19] The defendants have now reacted to this representation with the following list:

> (1) Report of the Commission of the European Communities entitled "Enforcement of Community Legislation Concerning Use of Driftnets in 1994["] (Nov. 25, 1994) * * *
>
> (2) Antonio Di Natale and Giuseppe Notarbartolo di Sciara, "A review of the passive fishing nets and trap fisheries in the Mediterranean Sea and of the Cetacean Bycatch" * * *
>
> (3) Giuseppe Notarbartolo di Sciara, "A note on the cetacean incidental catch in the Italian driftnet swordfish fishery, 1986–88["], Rep. Int. Whal. Commn. 40:459–460 (1990) * * *
>
> (4) Report of the Workshop on Mortality of Cetacean in Passive Fishing Nets and Traps (Oct. 1990) * * *
>
> (5) G.P. Donovan, Developments on Issues Relating to the Incidental Catches of Cetaceans Since 1992 and the UNCED Conference (pp 609–613 of the 1994 IWC Report) * * *
>
> (6) International Whaling Commission Scientific Committee Report, Small Cetacean Subcommittee (IWC/46/4 Annex G 1994) * * *
>
> (7) S.P. Northridge, Driftnet Fisheries & Their Impacts on Nontarget Species: A Worldwide Review, *Food & Agriculture Organization Fisheries Technical Paper No. 320,* (1991) * * *
>
> (8) General Fisheries Council for the Mediterranean & International Commission for the Conservation of Atlantic Tunas Expert Consultation on Evaluation of Stocks of Large Pelagic Fishes in the Mediterranean Area (Sept. 17–23 (1992) * * *
>
> (9) General Fisheries Council for the Mediterranean & International Commission for the Conservation of Atlantic Tunas Expert Consultation on Evaluation of Stocks of Large Pelagic Fishes in the Mediterranean Area (June 21–27, 1990) * * *

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[18] *Id.* at 6, n. 4.

[19] Reply Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, p. 4, n. 2.

(10) Di Natale, Swordfish Fishery in the Southern Tyrrhenian Sea: A Brief Report (1985–1989) (1990 CFCM-ICCAT 158–66) * * *

(11) Di Natale, Interaction Between Marine Mammals and Scombridae Fishery Activities: The Mediterranean Case, (1990 GFCM-ICCAT, pp. 167–213) * * *

(12) Letter from Scientific Counselor Gregory J. Dunn to Senator Enzo Maiorca * * *

(13) "Driftnets Impact on Protected Species: Observers Data From the Italian Fleet and Proposal for a Model to Assess the Number of Cetaceans in the By-Catch," Third GFCM/ICCAT Expert Consultation on Evaluation of Stocks of Large Pelagic Fishes in the Mediterranean Area (Fuengirola, Spain, September 19–24, 1994) * * *

(14) Di Natale, "A Review of Driftnet Catches by the Italian Fleet: Species Composition, Observers Data, and Distribution Along the Net," Third GFCM/ICCAT Expert Consultation on Evaluation of Stocks of Large Pelagic Fishes in the Mediterranean Area (Fuengirola, Spain, September 19–24 1994) * * *

(15) Documents memorializing a meeting between State Department Officials and Andrean Van Agt, the head of the European Union Delegation in Spring 1994;

(16) Film Footage taken by Greenpeace * * *

(17) Other, unidentified records of scientific conferences on driftnet fishing attended by the Department of Commerce officials;

(18) State Department documents monitoring consideration of the driftnet issue by the European Union Commission;

(19) Remaining pages of Administrative Record Document 70, which is an English translation of a French document which French document appears as Administrative Record Document 71.[20]

Whether or not these documents are or were in defendants' possession, as the plaintiffs apparently believe, the former take the position that none of them

> fulfill the criteria of 28 U.S.C. § 2635(d)(1) in that they were not (a) a copy of the contested determination and the findings or report upon which such determination was based, (b) a copy of a hearing or conference conducted by the agency, or (c) a document, comment, or other paper filed by the public, interested parties, or governments with respect to the agency's action.[21]

This may prove to be true, although defendants do offer to produce the Greenpeace videotape numbered (16) above and the missing pages of the document referred to at (19), but what is patent now is the incompleteness of that which even arguably can be called an administrative record.

In circumstances such as these here, where the defendants are also arguing that this action is not reviewable at all under the APA, discovery is appropriate—at least for the limited purpose of determining the

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20 Defendants' Motion for Protective Order, Exhibits 3 and 4, paras. 5.

21 *Id.*, paras. 6.

actual nature and extent of defendants' action(s) and record thereof. *Cf. Sharp Corp. v. United States,* 13 CIT 951, 958, 725 F.Supp. 549, 555 (1989), and cases cited therein. None of plaintiffs' outstanding discovery requests appear to attempt to elicit anything more, and the responses thereto on the part of the defendants may well advance final disposition of this matter.

In permitting this discovery, let both sides, represented as they seem to be by able counsel, be warned, however, that this ruling is not to be taken as a license for its abuse. As the Supreme Court has opined:

> * * * Of course, * * * inquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States v. Morgan,* 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan,* there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 420, recited in *Nat'l Corn Growers Ass'n v. Baker,* 9 CIT 509, 511 (1985).

V

In view of the foregoing discussion, defendants' motion to dismiss this action must be granted as to Count One of the complaint and denied as to Count Two. Their motion for a protective order as against plaintiffs' outstanding discovery requests must be, and it hereby is, denied.

Plaintiffs' application for an immediate writ of mandamus must be, and it hereby is, denied.

In the interest of expediting this action to final judgment, for which there appears to be good cause, the defendants are directed to answer the remaining complaint on or before September 1, 1995 and plaintiffs' outstanding interrogatories and requests to produce and to admit on or before September 15, 1995. A proposed form of pretrial order or dispositive motion is to be filed no later than October 6, 1995, at which time a date for trial or final hearing will be set.

(Slip Op. 95–149)

NTN BEARING CORP. OF AMERICA AND NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND RONALD H. BROWN, SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00503

Plaintiffs move for judgment upon the agency record pursuant to USCIT Rule 56.2. Plaintiffs specifically object to the following actions of the Department of Commerce, International Trade Administration ("Commerce"): (1) deduction of direct selling expenses from exporter's sales price rather than the addition of such expenses to foreign market value, and (2) calculating differences in merchandise on the basis of total cost of manufacturing.

Held: Plaintiffs' motion for judgment upon the agency record is denied because Commerce's methodology is reasonable, supported by substantial evidence, and in accordance with law.

[Plaintiffs' motion is denied and this case is dismissed.]

(Dated August 18, 1995)

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano, Lawrence M. Friedman and *Diane A. MacDonald)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* of counsel: *Thomas H. Fine* and *David Ross,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor, Federal-Mogul Corporation.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Myron A. Brilliant, Wesley K. Caine and *Lane S. Hurewitz)* for defendant-intervenor, The Torrington Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, NTN Bearing Corporation of America and NTN Kugellagerfabrik (Deutschland) GmbH ("NTN"), move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record claiming that the Department of Commerce, International Trade Administration ("Commerce"), erred in: (1) deducting direct selling expenses from exporter's sales price ("ESP") rather than adding such expenses to foreign market value ("FMV"), and (2) calculating the difference in merchandise ("difmer") on the basis of total cost of manufacturing ("COM") rather than variable cost of manufacturing ("VCOM").

The administrative determination under review is Commerce's final results in *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results"),* 58 Fed. Reg. 39,729 (July 26, 1993).

BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders which covered the subject merchandise. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (May 15, 1989).

On April 27, 1993, Commerce published its preliminary determinations of the administrative reviews of the antidumping duty orders on antifriction bearings and parts thereof from Germany. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 58 Fed. Reg. 25,610 (April 27, 1993). Included in these reviews was NTN Kugellagerfabrik (Deutschland) GmbH. *Id.*

On July 26, 1993, Commerce published its final results in this proceeding. *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order,* 58 Fed. Reg. 39,729 (July 26, 1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 51,055 (September 30, 1993); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 42,288 (August 9, 1993); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 59 Fed. Reg. 9,469 (February 28, 1994).

Discussion

The Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by Commerce in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *U.S. Direct Selling Expenses:*

NTN argues that Commerce's deduction of direct selling expenses incurred in the United States from USP is contrary to numerous decisions of this Court and, therefore, is not in accordance with law. *Plaintiffs' Motion and Memorandum in Support Thereof for Judgment on the Agency Record ("NTN's Brief")* at 3.

NTN subsequently abandoned this issue in light of *Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A. v. United States,* 36 F.3d 1565 (Fed. Cir. 1994), where Commerce's policy has been vindicated. *Plaintiffs' Reply to the Responses of Defendants and Defendant-Intervenors to Plaintiffs' Motion for Judgment on the Agency Record* at 1. Accordingly, this Court will not further consider this issue.

2. *Difference in Merchandise Test:*

Citing previous determinations, NTN challenges Commerce's difmer calculation because in its calculation of the difmer test it used COM in the denominator of its equation, rather than VCOM, contrary to Commerce's previous practice. NTN argues that the use of COM in the denominator is an arbitrary shift in policy that will result in a higher denominator, thus reducing the difmer ratio and making it more likely that dissimilar merchandise will be compared. *Plaintiffs' Brief* at 4–7.

Commerce asserts its use of total cost of manufacture as the denominator for its difmer test was reasonable and within its discretion. Commerce contends its methodology will result in a greater number of "matches" of U.S. and home market merchandise, thereby furthering the statutory preference for comparisons based on prices rather than constructed value. *Defendants' Memorandum in Opposition to the Motion of NTN Bearing Corporation of America and NTN Kugellagerfabrik (Deutschland) GmbH For Judgment Upon the Agency Record* at 6–14.

Defendant-intervenor Federal-Mogul Corporation argues that Commerce's methodology in the twenty percent difmer cap is reasonable since it relies on consistent values and calculates the relevant cost ratio. *Response of Defendant-Intervenor Federal-Mogul Corporation to Plaintiffs' Motion for Judgment on the Agency Record* at 2–5.

Defendant-intervenor The Torrington Company asserts that Commerce's application of COM, rather than VCOM, is reasonable given the broad nature of the statutory requirement. *Opposition of Defendant-Intervenor The Torrington Company to the Motion of the Plaintiffs for Judgment Upon the Administrative Record* at 6–8.

When identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select "similar" comparison merchandise based upon the physical characteristics of the merchandise being compared. 19 U.S.C. § 1677(16).[1] No guidance is provided in the Act or the regulations as to what method of calculation should be selected for considering "similar" merchandise. In addition, neither the statute nor the regulations limit the difmer test to VCOM as the denominator. Accordingly, Commerce has been granted broad discretion to devise a methodology for determining what constitutes "similar" merchandise. *E.g., Smith-Corona Group*

[1] 19 U.S.C. § 1677(16) (1988) provides:

> The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purpose of part II of this subtitle can be satisfactorily made:
>
> **(A)** The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> **(B)** Merchandise—
>
> **(i)** produced in the same country and by the same person as the merchandise which is the subject of the investigation,
> **(ii)** like that merchandise in component material or materials and in the purposes for which used, and
> **(iii)** approximately equal in commercial value to that merchandise.
>
> **(C)** Merchandise—
>
> **(i)** produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
> **(ii)** like that merchandise in the purposes for which used, and
> **(iii)** which the administering authority determines may reasonably be compared with that merchandise.

v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

In this review, Commerce implemented its twenty percent difmer cap to determine whether nonidentical products in the U.S. and home markets are similar enough that they may be reasonably compared. Commerce divided the difmer adjustment by the total manufacturing costs of the U.S. product and used a twenty percent cap as a benchmark for determining comparability. *Final Results,* 58 Fed. at Reg. 39,766.

Commerce explained its methodology in this review:

> The total COM is an appropriate point of reference for the 20-percent difmer test. We are measuring the physical differences in merchandise * * *. Since differences in VCOM are primarily attributable to physical differences in merchandise, it is appropriate to use VCOM in the numerator.
>
> The purpose of choosing the total COM as the point of reference is to provide a stable benchmark against which the absolute size of the physical difference in merchandise can be compared in order to determine if the difference is so large that the two products being compared cannot be considered similar for the purposes of the model match. We are not using the price of the U.S. model as this benchmark because the price of the model may be distorted if the model is sold at less than foreign market value in the United States. Total COM is preferable to VCOM as a point of reference because it more closely approximates the value of the model.

Id. Commerce's calculation formula for performing the twenty percent difmer cap has varied over the years. Commerce released a policy bulletin in July 1992 that established a consistent policy:

> While the numerator has always been the difference in variable production cost, different denominators have been used * * *. Because variable manufacturing costs change as a share of total manufacturing costs from product to product, the size of a 20% difference would consequently vary as well in relation to both the price and total manufacturing costs. Therefore, a more stable basis for the denominator is the total manufacturing costs, and it has been chosen for uniform use.

Import Administration Policy Bulletin 92.2 at 3 (July 29, 1992).

Upon review, this Court finds that Commerce's model matching methodology was reasonable and in accordance with law and that Commerce acted within its discretion in its choice of methodology. *See Smith-Corona,* 713 F.2d at 1571. Accordingly, Commerce is hereby affirmed on this issue.

Conclusion

In accordance with the foregoing opinion, this Court, after due deliberation and a review of all papers in this action, finds that Commerce's actions were in accordance with law and supported by substantial evidence. For the reasons stated above, NTN's motion for judgment upon the agency record is denied in all respects and the Final Results are affirmed. This case is hereby dismissed.

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